Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

The Real Truth About Obama, Inc., *Petitioner*

v.

Federal Election Commission and United States Department of Justice

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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Questions Presented

1. Whether the district court abused its discretion by applying improper legal standards to deny a preliminary injunction permitting The Real Truth About Obama, Inc. ("RTAO") to engage in issue advocacy concerning the positions of a public figure on issues in public debate.

2. Whether the First Amendment requires speech-protective preliminary-injunction standards for issue advocacy.

3. Whether RTAO had likely success on the merits (and so met the other preliminary-injunction standards) because the following provisions violate the First Amendment, Fifth Amendment, and/or exceed statutory authority:

a. 11 C.F.R. § 100.22(b) (Federal Election Commission's ("FEC") non-"magic words" "express advocacy" definition);

b. 11 C.F.R. § 100.57 (FEC's rule treating all of a donation as a regulable "contribution" if made in response to a communication "indicat[ing] that any portion . . . will be used to support or oppose the election of a . . . federal candidate");

c. FEC's enforcement policy for imposing "political committee" status based on activity other than regulable election-related activity; and

d. 11 C.F.R. § 114.15 (FEC's test for determining regulable "electioneering communications" that purports to implement the "appeal to vote" test of *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (Roberts, C.J., joined by Alito, J.), but makes that test merely part of FEC's test).

Corporate Disclosure

The Real Truth About Obama, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock.

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Petition[1]

RTAO requests certiorari review of *RTAO v. FEC*, 575 F.3d 342 (4th Cir. 2009).

Opinions Below

The order denying rehearing en banc (App. 56a) is unreported. The opinion affirming the district court (App. 1a) is reported at 575 F.3d 342. The district court's order denying a preliminary injunction (App. 54a) is unreported. The district court's opinion denying a preliminary injunction (App. 19a) is reported at *RTAO v. FEC*, No. 08-483, 2008 WL 4416282 (Aug. 5, 2009).

Jurisdiction

The appellate court's opinion (App. 1a) and judgment (App. 18a) were filed August 5, 2009. RTAO filed a timely petition for rehearing en banc on August 17, 2009. The appellate court's order denying rehearing en banc (App. 56a) was entered October 6, 2009. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations

Appended are: First Amendment (App. 57a); Fifth Amendment (App. 57a); 2 U.S.C. § 431(17) (App. 57a); 11 C.F.R. § 100.16(a) (App. 58a); 11 C.F.R. § 100.22 (App. 58a); 11 C.F.R. § 100.57(a) (App. 59a); 11 C.F.R. § 114.15 (App. 59a).

Case

This case involves a pre-enforcement, as-applied

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[1] As this petition goes to the printer, *Citizens United v. FEC* (No. 08-205) remains undecided. *Citizens* may affect this case.

and facial challenge to an FEC policy and three regulations that restrict RTAO's issue advocacy.

RTAO filed suit July 30, 2008, moving for preliminary injunction regarding *Change* (App. 20a), an ad it intended to post on its website and broadcast, and a fundraising solicitation (App. 22a). On August 20, RTAO filed another preliminary injunction motion regarding *Survivors* (App. 21a), an ad it intended to post on its website and broadcast.

RTAO sought judgment (a) declaring 11 C.F.R. §§ 100.22(b), 100.57, and 114.15 and FEC's policy for determining "political committee" ("PAC") status unconstitutional for vagueness and overbreadth (under the First and Fifth Amendments) and beyond statutory authority; (b) declaring the regulations and policy void under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; and (c) preliminarily and permanently enjoining enforcement of the regulations and policy, facially and as applied to RTAO and its activities.

RTAO is a nonstock, nonprofit, Virginia corporation, with its principal place of business in Richmond, Virginia. FEC is the federal government agency with enforcement authority over the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 et seq. FEC promulgated the regulations and policy at issue. The Department of Justice ("DOJ") is an executive department of the federal government that controls criminal prosecutions and civil suits in which the United States has an interest. (Compl. ¶¶ 5-7.)

RTAO was incorporated in July 2008. It is nonprofit under 26 U.S.C. § 527, i.e., it is a "political organization" that may receive donations and make disbursements for political purposes without paying corporate income taxes. RTAO is an issue-advocacy 527. (Compl.

¶¶ 8-9.)

RTAO is not a FECA "political committee" because none of its communications will qualify as either a "contribution" or "expenditure" aggregating more than $1,000 during a calendar year, the trigger requirement under 2 U.S.C. § 431(4) (PAC definition). Under its organic documents, RTAO may not engage in the "express advocacy" that would make a communication a regulable "independent expenditure" under 2 U.S.C. § 431(17). RTAO is also not properly a PAC because, even if it were to reach the $1,000 trigger, it does not meet the major-purpose test. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 253 (1986) ("*MCFL*"). (Compl. ¶¶ 10-11.)

However, RTAO had a reasonable belief that it would be deemed a PAC by FEC because of (a) FEC's recent use of 11 C.F.R. §§ 100.22(b) and 100.57 and other elements of FEC's PAC-status enforcement policy, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC-Status 2*"), to declare 527s PACs, *id.* at 5605, and (b) the similarity of RTAO and its intended activities to organizations identified in *PAC-Status 2*. (Compl. ¶ 13.)

As a corporation, RTAO may not make "independent expenditures," 2 U.S.C. § 431(17) (definition); 2 U.S.C. § 441b(a) (prohibition). This express-advocacy prohibition extends to websites and emails. *See* FEC, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006); 11 C.F.R. § 114.4.

RTAO intended to provide accurate and truthful information about then-Senator Obama's public-policy positions on a website and produce audio ads, *Change* and *Survivors*, and place them on its website and

broadcast them within sixty days before the 2008 general election, so they would have been "electioneering communications," 2 U.S.C. § 434(f)(3). RTAO intended to create digital postcards setting out Senator Obama's public-policy positions on abortion, and website viewers could have sent them to friends. One would have been like *Change* but in first person and "signed" by "Barack Obamabortion." (Compl. ¶¶ 16-19.)

To fund its activities, RTAO needed to solicit potential donors. One planned means was a fundraising communication. RTAO intended to raise over $1,000 with this communication and disburse over $1,000 to broadcast the ads and put them on the website. (Compl. ¶ 20.)

RTAO was chilled from proceeding by a reasonable belief that it would be subject to investigation and possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that FEC has deemed 527s to be PACs based on 11 C.F.R. §§ 100.22(b) and 100.57 and FEC's PAC-status policy *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) (*"PAC-Status 1"*); *PAC-Status 2*, 72 Fed. Reg. 5595. (Compl. ¶ 22.)

RTAO was also chilled from proceeding because, if it were later deemed to have been a PAC while doing its activities, it would have violated FECA for not using "federal funds" (funds raised subject to federal source-and-amount restrictions) for the fundraising communication, *see* FEC Advisory Opinion 2005-13 at 1 (EMILY's List). (Compl. ¶ 23.)

RTAO's chill was heightened by DOJ's declaration that investigations and criminal prosecutions of "knowing and willful" violations of these FECA provisions by 527 corporations was a priority. (Compl. ¶ 24.)

Consequently, RTAO reasonably feared, if it proceeded with its intended activities: (a) that *Change* and *Survivors* (both on RTAO's website and as broadcast) would be deemed express advocacy under 11 C.F.R. § 100.22(b) and, if RTAO were *not* deemed a PAC, it would be in violation of FECA for making a forbidden corporate independent expenditure, failing to place a disclaimer on its ads, and failing to file independent expenditure reports; (b) that, if RTAO *were* deemed to be a PAC, under FEC's PAC enforcement policy and because either the publication of its ads were considered an "expenditure" (under § 100.22(b)) or the fundraising communication were considered a "contribution" (under § 100.57), RTAO would be in violation of FECA for failure to abide by numerous PAC requirements; and (c) in any event, that RTAO would suffer an intrusive and burdensome investigation and possible enforcement action with civil and criminal penalties. So RTAO would not proceed with its intended activities unless it received the judicial relief requested. (Compl. ¶ 25.)

RTAO also reasonably feared, if it broadcast *Change* and *Survivors*, that it would have broadcast prohibited electioneering communications because FEC's rule at 11 C.F.R. § 114.15 (creating an exception to the electioneering communication prohibition, 2 U.S.C. § 441b) is vague and overbroad and RTAO could not be sure that its ads are protected communications under FEC's rule, although it believes that they are protected under the "appeal to vote" test of *FEC v. Wisconsin Right to Life*, 551 U.S. at 470 (Roberts, C.J., joined by Alito, J.).[2] It was impossible at the time of

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[2] This opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

filing to tell whether FEC (or courts) might deem *Change* and *Survivors* to be prohibited electioneering communications under 11 C.F.R. § 114.15 or prohibited express-advocacy independent expenditures under 11 C.F.R. § 100.22(b) because the tests are similar and vague. So RTAO would not proceed with its plan to broadcast *Change* and *Survivors* during electioneering communication blackout periods absent requested judicial relief. (Compl. ¶ 26.)

RTAO's chill was irreparable harm because it was the loss of First Amendment rights. RTAO would like to do materially similar future activities, so the need for a preliminary injunction is capable of repetition yet evading review. There is no adequate remedy at law. (Compl.¶¶ 27-28.)

In opposing the first preliminary injunction motion, FEC insisted that *Change* was neither express advocacy under 11 C.F.R. § 100.22(b) nor a prohibited electioneering communication under 11 C.F.R. § 114.15 and that the fundraising communication would not solicit "contributions" under 11 C.F.R. § 100.57. So FEC insisted that RTAO would not trigger the $1,000 "expenditure" or "contribution" thresholds for PAC status under 2 U.S.C. § 431(4) and the case was non-justiciable as to those. (FEC Answer ¶¶ 22-24.) But FEC decided that *Survivors* was prohibited both as express advocacy (§ 100.22(b)) and an electioneering communication (§ 114.15). (FEC Answer ¶¶ 22, 25.) Despite FEC's position that *Change* was not express advocacy, the district court decided that "it is clear that reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," so it would be express advocacy under § 100.22(b). (App. 34a; *see also* App. 36a n.3 ("clear both are expressly advocating the

defeat of Senator Obama").)

This case was brought under 28 U.S.C. § 1331. On September 10, 2008, the district heard the preliminary injunction motions. On September 11, the court issued an order denying the motions (and motions to expedite and consolidate the preliminary injunction and merits hearings). On September 12, RTAO noticed appeal (under 28 U.S.C. § 1292(a)(1)) of the denials of preliminary injunction. On September 24, the district court issued its preliminary-injunction Memorandum Opinion, deciding that RTAO had standing but failed its preliminary-injunction burden. (App. 19a.)

The appellate court affirmed the district court on August 5, 2009 (App. 1a), and denied rehearing en banc on October 6 (App. 56a).

Reasons to Grant the Petition

I. This Case Involves a Matter of Great National Importance.

Central to this case is the vitally important question of how to protect the issue advocacy essential to our democratic republic. This Court has rejected attempts to restrict issue-advocacy communications and issue-advocacy groups in *Buckley*, 424 U.S. 1; *MCFL*, 479 U.S 238; *McConnell v. FEC*, 540 U.S. 93 (2003);[3] and *WRTL-II*, 551 U.S. 449. This case challenges renewed efforts to restrict issue-advocacy communica-

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[3] While *McConnell* facially upheld regulation of electioneering communications, it worked *within Buckley*'s speech-protective framework by seeking to identify the "functional equivalent of express advocacy," *id.* at 206, recognizing the need to protect issue advocacy, *id.* at 206 & n.88, employing unambiguously-campaign-related principle (*see infra*), *id.* at 192, and restating the major-purpose test, *id.* at 170 n. 64.

tions and groups.

While *WRTL-II* went far to reaffirm protection for issue-advocacy communications, there remains a concerted effort to collaterally attack issue advocacy by trying to impose onerous PAC status on issue-advocacy groups. Uniquely, this case brings together all three elements involved in defining PACs, i.e., regulations governing the "expenditures" (11 C.F.R. § 100.22(b)) and "contributions" (11 C.F.R. § 100.57) triggering PAC status under 2 U.S.C. § 431(4) and an enforcement policy governing the major-purpose test that *Buckley*, 424 U.S. at 79, and *MCFL*, 479 U.S. at 252 n.6, held that the First Amendment requires to protect issue-advocacy groups. This Court's review is again required to protect issue advocacy groups.

II. The Appellate Court's Preliminary-Injunction Standard Conflicts With This Court's Decisions.

The appellate court employed a *heightened* version of the preliminary-injunction standard in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008). *See* II.A. The court ignored this Court's holding that preliminary-injunction burdens follow merits burdens. *See* II.B. *Winter* did not state how the preliminary-injunction standard applies to issue-advocacy, which this Court should decide. *See* II.C.

A. The Appellate Court Misinterpreted *Winter*.

The Fourth Circuit recited *Winter*'s likely-success-

and-harm standard[4] but substituted a "stringent" test and "heavy" burden:

> Notwithstanding the numerous Supreme Court opinions on the subject, the regulation of speech related to political campaigns remains a *difficult and complicated area of law that is still developing*. And *for that reason*, as well as the *stringent* preliminary injunction standard, [RTAO] bears a *heavy* burden in showing its likelihood of success.

App. 10a (emphasis added). This "heavy burden" on RTAO was erroneous. First, FEC had the burden. *See* II.B. Second, *speakers* cannot be penalized if *courts* complicate the First Amendment's prohibition on "abridging . . . freedom of speech." Third, if the court had followed this Court's unambiguously-campaign-related analysis as explained in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), it would have found the law simple. Fourth, perceived complexity should *lower* standards in an issue-advocacy case, where doubts are resolved in favor of *speakers*, not censors. *See WRTL-II*, 551 U.S. at 469 ("benefit of . . . doubt to protecting . . . speech"), 474 n.7 (same), 482 (same).

The appellate court's reliance on the required "clear showing" of "likely" success and harm to make *Winter*'s test "stringent" (App. 10a) was also erroneous because "clear showing" applies only to whether there is "*likely*" success and harm. It does not *elevate* "likely" to "highly

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[4] "'[P]laintiff . . . must establish that he is *likely* to succeed on the merits, . . . he is *likely* to suffer irreparable harm . . . , that the balance of equities tips in his favor, and that an injunction is in the public interest.'" App. 4a (*quoting Winter*, 129 S. Ct. at 374) (emphasis added).

likely," as the appellate court believed. And in First Amendment cases, burdens are raised on the Government, not speakers. *See, e.g., WRTL-II*, 551 U.S. at 464 ("*Government* must prove that applying [restriction] . . . to . . . ads furthers a compelling interest and is narrowly tailored to achieve that interest.").

B. The Courts Below Did Not Require the Burden to Follow the Merits Burden.

The preliminary-injunction burden should have fallen on government because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). When *Winter* spoke of a "clear showing," 129 S. Ct. at 376, it cited *Mazureck v. Armstrong*, 520 U.S. 968 (1997), which held that the "clear showing" applies to "the burden of persuasion," *id.* at 972. That burden, under strict scrutiny,[5] requires the *government*, even at the preliminary-injunction stage, to prove that its regulation is narrowly tailored to a compelling interest and that less-restrictive means are inadequate to serve the interest. *See Gonzales*, 546 U.S. at 428, *citing Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). *See also WRTL-II*, 551 U.S. at 464, 478; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). The court below erroneously ignored the First Amendment context in placing a heightened burden on RTAO instead of the government.

The burden was also on the government to prove its argument, which the court adopted (App. 17a), that the public-interest would be served by denying the prelimi-

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[5] Strict scrutiny applies to the core-political-speech restrictions in the present case. *See WRTL-II*, 551 U.S. at 464.

nary injunction because a "wild west" scenario was likely to ensue.[6] The government must provide proof, not speculation. *See Gonzales*, 546 U.S. at 430 ("strict scrutiny" rejects "categorical approach"). The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal citation omitted).

C. Speech-Protective Standards Apply to Preliminary Injunctions Involving Issue Advocacy.

This Court's speech-protective standards were ignored below. This case should be accepted to establish the protections afforded issue advocacy in the preliminary injunction context.

1. Preliminary Injunction Denials Effectively Decide Time-Sensitive Speech Cases.

Preliminary-injunction denials deprive issue-advocacy groups of timely opportunities to advocate their issues. RTAO wanted to talk about a politician's public-policy position during hot public debate on a subject when public attention was focused so as to make the communication uniquely effective. While this case is not moot because it is capable of repetition yet evading review, *see WRTL-II*, 551 U.S. at 461-64, the particular

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[6] Another federal district court expressly rejected this argument: "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *Ctr. for Individual Freedom, Inc. v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26 (S.D. W. Va. Oct. 17, 2008).

public teachable moment was lost. Where issue-advocacy involves time-sensitive issues, preliminary-injunction denials effectively decide the case. For example, in *WRTL-II*, WRTL was denied a preliminary injunction, which deprived it of the timely opportunity to advocate against judicial-nominee filibusters, 551 U.S. at 460. The 2007 vindication of WRTL's right to run its 2004 ads did not repair the deprivation when most timely. Recognizing this problem, *WRTL-II* set speech-protective standards for future as-applied challenges to assure expeditious decisions. *See id.* at 467-69.[7] These and other speech-protective standards should be incorporated into the preliminary-injunction standard. *See infra.*

2. This Case Should Be Accepted to Establish Speech-Protective Preliminary-Injunction Tests and Interests.

This Court should clarify that preliminary-injunction standards in issue-advocacy cases must protect speech. Some of these are provided briefly:

(1) the requirements of "likely" success and irreparable harm are not made "stringent" (i.e., "*highly* likely") by the required "clear showing" of likelihood, *see supra* at 8-9;

(2) the preliminary-injunction burden is not heavier with "a difficult and complicated area of law that is still developing," *see supra* at 9;

(3) the preliminary-injunction burden follows the merits burden, i.e., the government must justify restrictions, *see supra* at 10;

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[7] The dissent agreed that preliminary injunctions are available, 551 U.S. at 353, meaning that the standard must be *capable* of being met.

(4) the government must prove that alleged harms are *real*, not speculative, *see supra* at 10-11;

(5) likelihood of success should be considered first because other preliminary-injunction elements follow (violating free speech is irreparable harm and the balance of equities and public interest favor upholding constitutional rights);

(6) *WRTL-II*'s streamlined procedures and protective rules must be reflected in preliminary-injunction decisions involving issue advocacy near elections, *see* 551 U.S. at 478;

(7) standards involving issue advocacy must reflect that "the people are sovereign," *Buckley*, 424 U.S. at 14, there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted), and the First Amendment mandates a "freedom of speech" presumption;

(8) this free-speech presumption means that the status quo in a prohibitory injunction is the state of the law *before* the challenged provision regulating speech;

(9) where the unambiguously-campaign-related requirement is at issue, *see infra* at 30-33, the government always has the burden of meeting that threshold burden before meeting the burden imposed by the required scrutiny;

(10) because strict scrutiny is the antithesis of deference or presumed constitutionality, these are not afforded to speech regulation;

(11) in determining the balance of harms and public interest, "[w]here the First Amendment is implicated, the tie goes to the speaker," *WRTL-II*, 551 U.S. at 474;

(12) agencies have no per se interest in restricting

or regulating speech; their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond the agency's interest when balancing harms;

(13) the fact that issue-advocacy cases may occur near elections favors the plaintiffs in the preliminary-injunction balancing because issue advocacy is most important when public interest is highest: "a group can certainly choose to run an issue ad to coincide with public interest" without election proximity indicating "electioneering," *WRTL-II*, 551 U.S. at 473; and

(14) likely unconstitutional laws may not operate just because an election is near.

Issue-advocacy cases involve our most cherished liberties and the right of sovereign people to participate in self-governance. The high constitutional protection for issue advocacy reflects that fact. The preliminary injunction standard and cognizable interests must reflect that protection. The First Amendment forbids employing the same preliminary-injunction standards to issue advocacy that apply to feuds between neighbors over fence location. Under proper standards, RTAO would have received a preliminary injunction. Those standards should be articulated so issue-advocacy groups may advocate when public interest is high, as the First Amendment requires.

III. The Holding Below on Likely Success Conflicts With Decisions of This and Other Courts.

The enforcement policy and three regulations challenged here conflict with decisions of this Court and of federal district courts, *see infra*, and are inconsistent with this Court's jurisprudence, including its unambiguously-campaign-related principle (governing the

scope of regulable First Amendment activity in the campaign-finance context), *see infra*. RTAO had a clear likelihood of success on the merits.

A. Section 100.22(b): "Express Advocacy" Requires "Magic Words."

RTAO challenges 11 C.F.R. § 100.22(b), FEC's alternate, non-magic-words, express-advocacy definition as vague, overbroad, and beyond statutory authority. The appellate panel held that RTAO lacked a reasonable likelihood of success on the merits because it said that the definition is similar to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70. (App. 11-12a.)

1. The Holding Conflicts With Other Circuit Decisions.

The panel's decision conflicts with other circuit decisions holding that express advocacy requires the so-called "magic words," i.e., "express words of advocacy of election or defeat, such as 'vote for,'" *Buckley*, 424 U.S. at 44 n.52. The Fourth Circuit itself held this very regulation, § 100.22(b), unconstitutional for not requiring magic words, *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 329 (4th Cir. 2001),[8] and prior decisions held that express advocacy requires magic words, *see Leake*, 525 F.3d at 283 (requires "specific election-related words"); *FEC v. Christian Action Network*, 110 F.3d 1049, 1062 (4th Cir. 1997). The panel's decision also conflicts with other circuits that have held that it is a magic-words test. *See Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *FEC v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2d Cir.1980);

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[8] The challenged provision was also held unconstitutional by *Right to Life of Duchess County v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D. N.Y. 1998), for not employing magic words.

Center for Individual Freedom v. Carmouche, 449 F.3d 655, 664-65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir. 2004); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (striking definition patterned on 11 C.F.R. § 100.22(b)); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003)[9].[10]

2. The Holding Conflicts With This Court's Decisions.

The panel's holding also conflicts with this Court's holdings that—where the express-advocacy test applies—it is a magic-words test. *Buckley* clearly said that the express-advocacy test was an "express words of advocacy" test and provided examples. 424 U.S. at 44 n.52. *MCFL* said that "a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc.," 479 U.S. at 249 (citation omitted). *McConnell* repeatedly equated "express

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[9] This decision recognized that even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which FEC relies for the challenged regulation, "presumed express advocacy must contain some explicit *words* of advocacy." *See also American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest" (citation omitted)).

[10] State supreme courts have also held that "express advocacy" requires "magic words." *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Osterberg v. Peca*, 12 S.W. 3d 31 (Tex. 2000).

advocacy" with "magic words." *See* 540 U.S. at 126, 191-93, 217-19. *McConnell*'s "functionally meaningless" statement about the express-advocacy line, *id.* at 193, did not *eliminate* "express advocacy" as a category of regulated speech requiring "magic words," rather *McConnell* used that analysis to *add* regulation of "electioneering communications" to regulation of magic-words express advocacy. In *WRTL-II*, all members of the Court equated "express advocacy" with "magic words." *See* 551 U.S. at 474 n.7 (Alito, C.J., joined by Alito, J.), 495 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment), 513 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

3. The Lower Court's Justification Is Flawed.

The reliance of the appellate panel (App. 11-12a) on the similarity of § 100.22(b) to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, is misplaced. *WRTL-II*'s test is not a free-floating test that may be employed to communications that are *not* federally defined "electioneering communications." *WRTL-II* specifically acknowledged that the test is impermissibly vague absent that definition. *See* 551 U.S. at 474 n.7.

The disagreement of FEC and the district court over how § 100.22(b) applies to the *Change* ad, *see supra* at 6, reveals its unconstitutional vagueness. FEC insists that *Change* is *not* express advocacy (Dkt. 31 at 12-13, 27), but the district court declares that it *is*: "reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama." (App. 34a.) When a federal oversight agency and a federal court—both "reasonable"—cannot agree on the application of a test, the test is unconstitutional and offers no "'no security for free discussion. In these conditions it

blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim,'" *Buckley*, 424 U.S. at 43 (citation omitted).

Section 100.22(b) is also beyond statutory authority. The regulation cites as authority 2 U.S.C. § 431(17), the "independent expenditure" definition, which regulates only "an expenditure by a person [] expressly advocating the election or defeat of a clearly identified candidate." That definition implements the magic-words, express-advocacy constructions in *Buckley*, 424 U.S. 44 ("expenditure" limitation), 80 ("expenditure" disclosure), and *MCFL*, 479 U.S. at 249 (construing 2 U.S.C. § 441b, at issue here). There is no congressional authority anywhere for FEC to interpret "expressly advocating" other than as requiring magic words. Moreover, the only "expenditure" that FEC may regulate is one "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9), and it was precisely to such "for the purpose of influencing" language that *Buckley* gave "expenditure" an express-advocacy construction to preserve it from vagueness and overbreadth. 424 U.S. at 77, 80.

In sum, § 100.22(b) goes beyond any permissible construction of "express advocacy" or "expenditure," is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority" and void under 5 U.S.C. § 706. RTAO had likely success on the merits.

B. Section 100.57: Donations May Not Be Deemed "Contributions" Under Vague, Overbroad Standards.

RTAO challenges 11 C.F.R. § 100.57(a) (App. 59a) —which converts donations into regulable FECA "contributions"—as vague, overbroad, and beyond statutory authority. The appellate panel focused on

only one of RTAO's arguments against the provision, holding that RTAO lacked a reasonable likelihood of success on the merits because language it identified as vague ("support or oppose the election of") had been "sanctioned" by the Fourth Circuit.[11] (App. 13a.)

1. The Holding Conflicts With Other Circuit Decisions.

The appellate panel's holding conflicts with two circuits. First, it conflicts with the D.C. Circuit, which recently vacated this regulation in its entirety[12] as unconstitutional, *EMILY's List v. FEC*, 581 F.3d 1, 4, 18, 25 (D.C. Cir. 2009), and beyond statutory authority, *id.* at 21, 25. That court held that § 100.57 violates the First Amendment "right of citizens to band together and pool their resources as an unincorporated group or non-profit organization in order to express their views about policy issues and candidates for public office," *id.* at 4, because it was "not 'closely drawn' to serve a cognizable anticorruption interest," *id.* at 18. "Non-profits are entitled to raise money for their soft-money accounts to help support their preferred candidates, yet this regulation prohibits non-profits from saying as much in their solicitations." *Id.* This speech restriction violates a speaker's right "'to choose the content of his own message.'" *Id.* at 18 (*quoting WRTL-II*, 551 U.S. at 477 n. 9). The court held that § 100.57 was motivated by an "equalization rationale" that this Court has repeatedly "repudiated." *Id.* The court declared § 100.57 beyond statutory authority for "requir[ing] covered non-profits to treat as hard money certain donations

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[11] This assertion is erroneous. *See infra.*

[12] The regulation also provides allocation rules when both federal and non-federal candidates are involved. § 100.57(b)-(c).

that are not actually made 'for the purpose of influencing' federal elections." *Id.* at 21 (citation omitted). "Under FECA, FEC's authority extends only to regulating donations and expenditures made 'for the purpose of influencing any election for Federal office.'" *Id.* at 20 (*quoting* 2 U.S.C. § 431(8)(A)(i) ("contribution" definition)).

Second, this regulation conflicts with the decision on which FEC says it is based, *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*"). *See* 69 Fed. Reg. at 68057. FEC attempts to justify § 100.57(a) under *Buckley*'s phrase, "earmarked for political purposes," *supra*, as interpreted by *SEF*. But *SEF* does not justify the regulation. *SEF* said that *Buckley*'s "earmarked" language would apply to solicitations for contributions "that will be *converted* to expenditures *subject to regulation* under FECA," i.e., "activities or 'communications that *expressly advocate* the election or defeat of a clearly identified candidate.'" 65 F.3d at 295 (emphasis added). So for a donation to become a "contribution" under *SEF*, (a) the solicitation must request donations for express advocacy and (b) the recipient must actually "convert" the contribution into an expenditure for express advocacy. Section 100.57(a) fails both requirements. It waters down "express advocacy" to vague and overbroad "support or oppose," and it ignores the requirement that the donation actually be "converted" to express advocacy.

2. The Holding Conflicts With This Court's Decisions.

The panel's holding also conflicts with *Buckley*, which provided an authoritative construction of "contribution." *Buckley* restricted the scope of "contribution" to "funds provided to a candidate or political party or

campaign committee" or to "dollars given to another person or organization that are earmarked for political purposes." 424 U.S. at 23 n.24. By "earmarked for political purposes," *Buckley* meant donations designated and used for regulable campaign-related activity, e.g., express-advocacy "expenditures." But § 100.57(a) reaches beyond that approved "contribution" construction, creating "contributions" where they may not exist.

3. The Lower Court's Justification Is Flawed.

The appellate court is wrong on the one argument on which it relied, i.e., that *Leake*, 525 F.3d at 301, "sanctioned" "support or oppose" language. (App. 13a.) While *Leake* is not precedent here, it provides a lucid articulation of this Court's unambiguously-campaign-related principle, *see infra*, and the state of campaign-finance jurisprudence after *WRTL-II*, and it did *not* endorse the sort of approach taken in § 100.57.[13] The unambiguously-campaign-related principle that *Leake* recognized *excludes* the sort of vague, overbroad approach to campaign-finance law taken in § 100.57.

In sum, because *Buckley* has authoritatively con-

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[13] *Leake* dealt with "whether North Carolina's method for determining if a communication 'supports or opposes the nomination or election of one or more clearly identified candidates' unconstitutionally regulates issue advocacy," 525 F.3d at 280, and upheld an express-advocacy definition of "supports or opposes" while striking down another more akin to the FEC express-advocacy test at 11 C.F.R. § 100.22(b), 525 F.3d at 280, 285. This is the context of its statement that the state "remain[ed] free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of one or more clearly identified candidates.' *See* N.C. Gen. Stat. § 163-278.14A(a) (2007)." 525 F.3d at 301. The portion that *Leake* cited as permissible was the express-advocacy definition, and it was in no way approving "support or oppose" as defined in any way other than express advocacy.

strued the definition of "contribution" and established a constitutional limit on its application, § 100.57 is vague, overbroad, and void as "in excess of the statutory . . . authority . . . ," 5 U.S.C. § 706. RTAO had likely success on the merits of this claim.

C. PAC Status May Only Be Imposed on Groups With the Primary Purpose of Regulable, Campaign-Related Activity.

RTAO challenges FEC's PAC-status enforcement policy, found in *PAC-Status 1*, 69 Fed. Reg. 68056, and *PAC-Status 2*, 72 Fed. Reg. 5595. *PAC-Status 2* cites 11 C.F.R. §§ 100.22(b) and 100.57 (*see supra*) as central elements of FEC's enforcement policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations, *supra*, are also fatal to this enforcement policy.

A third element of the policy is FEC's interpretation of *Buckley*'s major-purpose test. In *PAC-Status 2*, FEC declined to adopt a rule for the major-purpose test, declaring that "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct," *id.* at 5601. FEC's vague and overbroad enforcement policy requires "a fact intensive inquiry" weighing vague and overbroad factors (with undisclosed weight) and "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including all an organization's "spending on Federal campaign activity" (not limited to spending on regulable activity) and other spending, as well as public and non-public statements, including statements to potential donors. *Id.*

PAC-Status 2 also indicated that FEC would consider other factors in its ad hoc, totality-of-the-circumstances, major-purpose test when it discussed its application of the policy to some 527 organizations in

previous investigations. 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis added), the fact that groups ceased activity after an election, *id.*, and the fact that they didn't make disbursements in state and local races. *Id.* In addition, FEC thought that it could determine a 527 group's major purpose from internal planning documents and budgets, *id.*, which would normally be protected by the First Amendment privacy right and were only obtained because the organization was subjected to a burdensome, intrusive investigation (which this approach encourages). Major purpose was even based on a private thank-you letter to a donor, after the donation had already been made. *Id.*

The appellate court held that RTAO lacked a reasonable likelihood of success on the merits because the policy "appears . . . adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contributions." (App. 51-52a.) The court's formulation reveals its misunderstanding of the jurisprudence. *See infra.*

1. The Holding Conflicts With Other Circuit Decisions.

The appellate panel's holding conflicts with another Fourth Circuit panel in *Leake*, which held that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," 525 F.3d at 287 (emphasis added). That approach would examine how much an advocacy group spends on express-advocacy

"independent expenditures" compared to its total disbursements in a particular year to determine if the group was a "political committee" for that year.[14] If over fifty percent of a group's expenditures were for express advocacy (or for FECA "contributions"), then the major purpose of the group would be "nominating or electing candidates," *Buckley*, 424 U.S. at 79, and PAC status could be imposed. There would be no examination of the non-regulable factors that FEC includes in its enforcement policy.

The appellate panel's holding also conflicts with another Fourth Circuit panel in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), which held that the "major purpose" must be "engaging in *express advocacy*," 168 F.3d at 712 (emphasis in original), which clearly requires that the activity considered to determine major purpose must be *regulable* election-related activity.[15]

The appellate panel's holding also conflicts with *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), which took a similar objective approach, relying on *MCFL* for how to determine PAC status, *id.* at 1152:

> In *MCFL*, the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organi-

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[14] *See FEC v. GOPAC*, 917 F. Supp. 851, 852 (D.D.C. 1996) (PAC-status determination done by particular year).

[15] *See also Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (*affirming Florida Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. Dec. 15,1999) ("organizations whose major purpose is engaging in 'express advocacy,'" *id.* at *4)).

> zational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252, 107 S.Ct. 616 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262, 107 S.Ct. 616 (noting that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee").

The cited "independent spending" at issue in *MCFL* was magic-words express advocacy. *See MCFL*, 479 U.S. at 249. In the present case, FEC's enforcement policy conflicts with these bright-line tests for PAC status, and the appellate court's holding conflicts with these decisions.

While other circuit courts have recognized the major-purpose test,[16] only *Leake*, *Bartlett*, and *Coffman*, *supra*, provide guidance on what *activities* may be considered in determining major purpose beyond what *MCFL* provided, *see supra*. And their guidance

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[16] *See United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392-93 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Florida Right to Life*, 238 F. 3d 1288 (*affirming* 1999 WL 33204523); *Colorado Right to Life*, 498 F.3d at 1153-54. Federal district courts have also addressed the test. *See, e.g.*, *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171 (D. Me. 1999); *GOPAC*, 917 F. Supp. 851; *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75 (1978).

conflicts with FEC's policy.

This issue is hotly debated among those affected by it, as may be seen in the comments on how major purpose should be determined in response to FEC's notice of proposed rulemaking (ending in FEC's decision in *PAC-Status 2* not to make a rule). *See* 69 Fed. Reg. 68056. And Professor Foley has published an article on the subject. *See* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. Ky. L. Rev. 341 (2004). But this Court's guidance is required to resolve the confusion.[17]

2. The Holding Conflicts With Decisions of This Court.

The appellate court's holding clearly conflicts with this Court's bright-line approach to determining "major

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[17] Confusion about PAC status and standards in the circuits is particularly evident in *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006), in which the Ninth Circuit approved the imposition of PAC-style burdens on an *MCFL*-corporation, which *MCFL* forbade, 479 U.S. at 262-64, 253-54. *Miles* said the burdens (imposed on groups making state-defined "electioneering communications") were "not particularly onerous," 441 F.3d at 791, because they did not "limit the amount that may be contributed to, or spent by, the entity," *id.* But Alaska imposed the same registration and periodic reporting requirements imposed on state PACs, required disclosure of *all* transactions, forbade corporate contributions, and required disbanding to discontinue reporting obligations—all of which are PAC-style burdens, not the one-time reporting of a regulated expenditure approved in *MCFL* for entities lacking the major purpose of nominating or electing candidates, 479 U.S. at 252-55. *Miles* conflicts with *California Pro-Life Council*, 328 F.3d 1088, which noted that *MCFL* "recognized that reporting and disclosure requirements," at issue in *Miles*, "are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy," *id.* at 1101.

purpose," which provides no encouragement to intrusive investigations and permits ready determination of major purpose. Major purpose may be determined by either an entity's expenditures, *MCFL*, 479 U.S. at U.S. at 262 (major-purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures), or by the organization's central purpose revealed in its organic documents, *id.* at 252 n.6 ("[O]n this record . . . MCFL['s] . . . central organizational purpose is issue advocacy."). The first test determines major purpose based on "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, i.e., true "contributions" and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there is an express intention to operate as a political committee, e.g., by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. § 441b(2)(c).

3. The Court's Justification Is Erroneous.

The lower court's formulation reveals its misunderstanding of the jurisprudence, *see supra*, because "contributions" are not even at issue here and the major-purpose test examines the nature of the *entity*, not the nature of a "contribution" (or "expenditure"), to determine whether PAC-status may be imposed or whether the one-time, "independent expenditure" reports endorsed in *MCFL*, 479 U.S. at 262, satisfy any government interest. The appellate court failed to comprehend the need for a bright-line test that could be easily understood and quickly applied without resorting to expensive, intrusive, time-consuming investigations (based on vague, overbroad criteria) and

after-the-fact determinations that a group that thought it was not a PAC was a PAC (and so in violation of numerous PAC requirements). FEC's ad-hoc, case-by-case approach chills free speech and association.

In sum, because FEC's enforcement policy goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a "contribution" or made an "expenditure," is unconstitutionally vague and overbroad, and is "in excess of the statutory . . . authority . . ." of FEC, it is void under 5 U.S.C. § 706. RTAO had likely success on the merits on this claim.

D. *WRTL-II*'s "Appeal to Vote" Test for Regulable "Electioneering Communications" May Not Be Demoted to a Mere Part of FEC's Test.

RTAO challenges 11 C.F.R. § 114.15, which purports to implement *WRTL-II*'s appeal-to-vote test for whether a corporate "electioneering communication"[18] may be prohibited. *WRTL-II*'s test is as follows: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-70. *WRTL-II* also provided instructions on how litigation must be conducted expeditiously without burden to challengers, *id.* at 469 (citations omitted), and required that the nature of an ad be determined from its actual text, not from surrounding *context* or from any effort to discern the *intent* behind the ad or the *effect* of the ad on an election, *id.* at 467-68, 473-74. After stating the test, *WRTL-II*

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[18] An "electioneering communication" is essentially a "targeted" ad identifying a candidate that is broadcast within 30 and 60 days before primaries (and conventions) and general elections. 2 U.S.C. § 434(f)(3).

applied it to specific grassroots lobbying and addressed arguments made by the parties in briefing, e.g., regarding "indicia of express advocacy." But none of this *application* was part of the *test*. That the appeal-to-vote test is the *only* test is confirmed by *WRTL-II*'s restatement of the test without an elements of the application. *See id.* at 476.

Section § 114.15(a), at first appears to set out the appeal-to-vote test as the primary test, but that test is never permitted to stand alone. Two FEC tests replace it. First, is the "safe harbor" test in paragraph (b), which is not applicable here. Second, is the "rules of interpretation" test in paragraph (c), which is a balancing test that demotes *WRTL-II*'s appeal-to-vote test to just *one* of *two* elements to be weighed on equal terms. The rules-of-interpretation test, balances two further equipoised tests: (1) an indicia-of-express-advocacy test and (2) a restatement of *WRTL-II*'s appeal-to-vote test. When a constitutional test is demoted to being only a part of a statutory test to determine whether the constitutional test is met, the statutory test is inherently vague and overbroad.

FEC then lists factors to put into the pans on the scale (without indicating the weight assigned each factor). Nothing in FEC's rule requires any clear call to action, which is essential for there to be an unambiguous "*appeal* to vote." Rather than focusing on the "appeal to vote" central to *WRTL-II*'s test, the factors listed are all peripheral and could be present in a wide range of constitutionally-protected issue advocacy. FEC has erroneously imported the *application* of *WRTL-II*'s appeal-to-vote test in the grassroots lobbying setting of that case, 551 U.S. at 469-70, into the test itself.

WRTL-II limited the scope of the statutory "elec-

tioneering communications" prohibited by 2 U.S.C. § 441b, but 11 C.F.R. § 114.15 rejects this limitation. Because *WRTL-II's* appeal-to-vote test is an authoritative construction to the extent of the corporate prohibition on "electioneering communications," and a constitutional limit on the application of the electioneering communication prohibition, the rule is beyond FEC's statutory authority.

The court below held that RTAO lacked likely success as to this challenge because "§ 114.15 mirrors the language of [*WRTL-II*]" (App. 13a), but as just shown, the regulation actually demotes *WRTL-II's* test to being merely a *part* of another test.

Because the regulation at 11 C.F.R. § 114.15 goes beyond any permissible construction of *WRTL-II's* appeal-to-vote test, is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of FEC, it is void under 5 U.S.C. § 706. RTAO had likely success on this claim.

E. This Court Restricts Campaign-Finance Regulation to "Unambiguously Campaign Related" Activity.

The challenged regulations and enforcement policy all violate this Court's "unambiguously campaign related" principle for determining the permissible scope of campaign-finance regulation. *See infra.* The appellate panel noted that RTAO "relied heavily on . . . *Leake*, 525 F.3d 274" (App. 8a)—which articulated the principle and relied on it to establish the scope of regulable expenditures and the major-purpose test (*see infra*)—but then ignored the principle.

1. The Decision Below Conflicts With Other Circuit Decisions.

The appellate court's decision conflicts with another Fourth Circuit panel's decision in *Leake*, which held that "after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate'" 525 F.3d at 281 (*quoting Buckley*, 424 U.S. at 80). It also conflicts with other circuit decisions that have recognized the principle. *See Furgatch*, 807 F.2d at 860; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 & n.10 (11th Cir. 1982); *Machinists Non-Partisan Political League*, 655 F.2d at 391 & n.23.[19]

2. The Decision Below Conflicts With This Court's Decisions.

The decision below—ignoring the unambiguously-campaign-related principle—conflicts with *Buckley* and other decisions of this Court applying this threshold principle. *Buckley* held that disclosure may only be compelled for expenditures for communications "unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80, i.e., "unambiguously campaign related," *id.* at 81. *Buckley* applied this principle to expenditure limitations, *id.* at 42-44, PAC status and disclosure, *id.* at 79, non-PAC disclosure of contributions and independent expenditures, *id.* at 79-

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[19] Federal district courts have also recognized the unambiguously-campaign-related principle. *See Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp.2d 777, 785 (S.D. W.Va. 2009); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1141, 1144 (D. Utah 2008).

81, and contributions, *id.* at 23 n.24, 78. *Buckley* employed the major-purpose and express-advocacy tests to implement this principle. *Id.* at 44, 79-80.

FEC recognized and adopted the principle in its Petition for Writ of Certiorari in *FEC v. Faucher* (No. 90-1923), arguing authority to regulate an "expenditure that is unambiguously election related, *id.* at 19. And Senators McCain and Feingold, the other primary BCRA sponsors, and other members of the "reform" lobby recognized and adopted the principle in *McConnell*, identifying it as the principle on which Congress based BCRA.[20] For them to reject the analysis now would be a bait and switch.

McConnell endorsed the reformers' reliance on *Buckley*'s twin precepts. 540 U.S. at 192 ("vagueness and overbreadth"), citing the *Buckley* passage to which the reformers pointed for the unambiguously-campaign-related precept, *id.* at 191 (citation omitted).

WRTL-II limited regulable "electioneering communications" to "campaign speech," 551 U.S. at 478-79, with the appeal-to-vote test, *id.* at 469-470, which is the application of the unambiguously-campaign-related

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[20] They argued that

> [t]wo general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' [*Buckley*,] 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*,' *id.* at 80; *see id.* at 76-82. Those are precisely the *precepts* to which *Congress* adhered in framing Title II.

Brief for Intervenor-Defendants Senator John McCain et al. at 62, *McConnell*, 540 U.S. 93 (emphasis added) (*available at* http:// supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf).

principle to electioneering communications, *see Leake*, 525 F.3d at 281-83.

The principle clarifies campaign-finance jurisprudence. It permits regulation of only express-advocacy "independent expenditures" and appeal-to-vote "electioneering communications," *Leake*, 525 F.3d at 284, so the hybrid at 11 C.F.R. § 100.22(b) is unconstitutional. The requirement that the only regulated activity be "unambiguously campaign related" dooms the vague, overbroad approach of § 100.57. The principle requires an objective major-purpose test determined on the basis of "regulable, election-related speech," *Leake*, 525 F.3d at 287, so FEC's vague, overbroad PAC-status policy fails. FEC's demotion of *WRTL-II*'s appeal-to-vote test—the implementation of the principle for electioneering communications—to a mere part of FEC's own test, dooms § 114.15.

IV. RTAO Had Irreparable Harm And Met the Other Preliminary-Injunction Elements.

In an expressive association case, the other elements of the preliminary-injunction standard essentially follow from likely success on the merits. "Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

The balance of harms favors RTAO, whose hardship

is the irreparable loss of First Amendment rights to engage in core political speech in the form of highly-protected issue advocacy at the most opportune time in terms of public interest. Defendants' interest in enforcing FEC's regulations and policy is substantially reduced by the showing of the high probability of success on the merits. Clearly, if the challenged provisions are unconstitutional, Defendants have *no* cognizable interest in enforcing them. Moreover, there remain numerous campaign-finance laws and regulations that will remain in effect that will adequately protect the governmental interests that this Court has identified in this area to the extent that they regulate only activity that meets the unambiguously-campaign-related requirement and the derivative express-advocacy test, "contribution" construction, major-purpose test, and appeal-to-vote test.

The public interest analysis also follows the high likelihood of success and favors RTAO. The public has an interest in its government entities promulgating and enforcing constitutional regulations and policies. It has an interest in promoting core political speech. And it has an interest, in the First Amendment context, in receiving RTAO's speech. An injunction serves these interests.

Conclusion

For the reasons stated, this Court should grant this petition.

Respectfully submitted,

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Appendix

[***Editor's Note:*** *Page numbers from the unreported opinion [*] and the reported citation, 575 F.3d 342 [**], are indicated.*]

[Doc. 71, filed August 5, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff,	)	
v.	)	Civil Action No. 08-1977.
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

OPINION

The Real Truth About Obama, Inc. ("Real Truth") commenced this action against the Federal Election Commission [*3] and the Department of Justice, challenging the constitutionality of three Federal Election Commission regulations-11 C.F.R. §§ 100.22(b), 100.57(a), and 114.15-and a Federal Election Commission enforcement policy under the First and Fifth Amendments. Real Truth alleged that these regulations chilled its right to disseminate information about presidential candidate Senator Obama's position on abortion. Real Truth seeks, among other things, a preliminary injunction prohibiting enforcement of these provisions.

The district court denied Real Truth's motion for a

preliminary injunction, finding that (1) Real Truth did not show that it [**345] was likely to succeed on the merits as to any of its challenges; (2) Real Truth would not be irreparably harmed if the preliminary injunction were not granted; and (3) issuing the injunction would be against public policy.

On appeal, we apply the Supreme Court's standard for preliminary injunctions stated in *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ----, 129 S.Ct. 365, 374-76, 172 L.Ed.2d 249 (2008), and conclude that the district court did not abuse its discretion in denying the motion for a preliminary injunction. Accordingly, we affirm.

I.

Real Truth, a Virginia nonprofit corporation organized on July 24, 2008, as an "issue-adversary '527' organization" under § 527 of the Internal Revenue Code, commenced this action six days after its incorporation to challenge three Federal Election Commission regulations-11 C.F.R. § 100.22(b) (defining when a communication *expressly advocates* the election or defeat of a clearly identified candidate); 11 C.F.R. § 100.57(a) (defining campaign contributions to include funds "*to support or oppose* the election of a clearly identified Federal candidate" (emphasis added)); 11 C.F.R. § 114.15 (regulating corporate and labor organization funds expended for electioneering communications)-and a Federal Election [*4] Commission enforcement policy issued for determining Political Action Committee ("PAC") status using "the major-purpose test." Real Truth alleged that these provisions are "unconstitutionally overbroad" and "void for vagueness" in violation of the First and Fifth Amendments.

In its complaint, Real Truth asserted that it intends

to publish audio advertisements stating candidate Obama's position on abortion and to circulate a fund-raising letter to raise money to publish the "well-documented facts about Obama's views on abortion." While Real Truth asserted in its complaint that it is not a PAC and did not advocate the election or defeat of Senator Obama, it alleged that it

> is chilled from proceeding with these activities because it reasonably believes that it will be subject to an FEC and DOJ investigation and possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that the FEC has deemed 527s to be PACs, based on [the challenged regulations].

Included in the relief that Real Truth seeks is a preliminary injunction enjoining the enforcement of the challenged provisions against Real Truth's "intended activities" and against others similarly situated.

The district court denied Real Truth's motion for preliminary injunction by order dated September 11, 2008, and Real Truth filed this interlocutory appeal, contending that the district court abused its discretion in denying its motion for a preliminary injunction.

II.

A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial. [*5] *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524-26 (4th Cir.2003); *see also De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220-21, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary

injunction must demonstrate by "a clear showing" that, among other things, it is likely to succeed on the merits at trial. [**346] *Winter*, 129 S.Ct. at 376; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam). We review the grant or denial of a preliminary injunction for abuse of discretion. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *In re Microsoft Litig.*, 333 F.3d at 524-25.

In its recent opinion in *Winter*, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction, stating that the plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 129 S.Ct. at 374. And all four requirements must be satisfied. *Id.* Indeed, the Court in *Winter* rejected a standard that allowed the plaintiff to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76.

Before the Supreme Court's decision in *Winter*, the standard articulated in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.1977), governed the grant or denial of preliminary injunctions in the Fourth Circuit. *See also, e.g., Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811-14 (4th Cir.1991); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359-60 (4th Cir.1991). In

Blackwelder we adopted "the balance-of-hardship test," which begins with balancing the hardships [*6] of the parties. 550 F.2d at 196. We stated, "the first step in a Rule 65(a) preliminary injunction situation is for the court to balance the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant." *Id.* at 195. If that balancing results in an imbalance in the plaintiff's favor, we then determine whether the plaintiff "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Id.* In *Blackwelder*, we specifically held that the district court erred when it demanded that the plaintiff "first show 'likelihood of success' in order to be entitled to preliminary relief." *Id.*

Similarly, in *Rum Creek Coal*, we reiterated that the "hardship balancing test applies to determine the granting or denial of a preliminary injunction." 926 F.2d at 359. We held that only after the district court concluded that the balance of the likelihood of the irreparable harm to the parties tilted in favor of the plaintiff was it to turn to the merits of the case to determine whether the plaintiff "show[ed] grave or serious questions for litigation." *Id.* at 363 (internal quotation marks omitted).

Our *Blackwelder* standard in several respects now stands in fatal tension with the Supreme Court's 2008 decision in *Winter*.

First, the Supreme Court in *Winter*, recognizing that a preliminary injunction affords relief before trial, requires that the plaintiff make a clear showing that it will likely succeed on the merits at trial. 129 S.Ct. at 374, 376. Yet in *Blackwelder*, we instructed that the

likelihood-of-success requirement be considered, if at all, only *after* a balancing of hardships is conducted and then only under the relaxed standard of showing that "grave or serious *questions* are presented" for litigation. 550 F.2d at 195-96 (emphasis added); *see also Rum Creek Coal*, 926 F.2d at 363. The *Winter* requirement that the plaintiff [**347] clearly demonstrate that it will *likely succeed* on the [*7] merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.

Second, *Winter* requires that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief. 129 S.Ct. at 374-76. *Blackwelder*, on the other hand, requires that the court *balance* the irreparable harm to the respective parties, requiring only that the harm to the plaintiff outweigh the harm to the defendant. 550 F.2d at 196. Moreover, *Blackwelder* allows that upon a strong showing on the probability of success, the moving party may demonstrate only a possibility of irreparable injury, id. at 195-a standard explicitly rejected in *Winter*, 129 S.Ct. at 375-76.

Third, in *Winter*, the Supreme Court emphasized the public interest requirement, stating, "In exercising their sound discretion, courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction." 129 S.Ct. at 376-77 (emphasis added) (internal quotations marks and citation omitted). Yet, under the *Blackwelder* standard, the public interest requirement "does not appear always to be considered at length in preliminary injunction analyses," even though it must always be considered. *Rum Creek Coal*, 926 F.2d at

366-67; see also *Blackwelder*, 550 F.2d at 196.

Fourth, while *Winter* articulates four requirements, each of which must be satisfied as articulated, *Blackwelder* allows requirements to be conditionally redefined as other requirements are more fully satisfied so that "grant[ing] or deny[ing] a preliminary injunction depends upon a 'flexible interplay' among all the factors considered ... for all four [factors] are intertwined and each affects in degree all the others." 550 F.2d at 196. Thus, as an example, the court in *Blackwelder* observed:

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. [*8] If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; *and plaintiff need not show a likelihood of success.*

550 F.2d at 196 (emphasis added).

Because of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.

Thus, we review the district court's denial of the preliminary injunction under the *Winter* standard, considering in light of the stated requirements the district court's findings and holdings (1) that Real Truth is not likely to succeed on the merits; (2) that Real Truth will not be irreparably harmed if the injunction is denied; and (3) that the injunction requested would not be in the public interest.

III.

In its complaint, Real Truth sought, as part of the relief requested, a preliminary injunction prohibiting the enforcement of 11 C.F.R. § 100.22(b) (defining the statutory term "expressly advocating"); 11 C.F.R. § 100.57(a) (regulating campaign contributions received in response to solicitations); 11 C.F.R. § 114.15 (regulating corporation or labor organization-funded "electioneering communications"); and the Federal Election Commission's policy statement regarding the analysis of PAC status. To support its position, Real Truth [**348] relied heavily on our recent decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir.2008). In denying Real Truth's motion for a preliminary injunction, the district court found that Real Truth was unlikely to succeed on the merits because the statutory provisions that Real Truth [*9] challenges are justified by *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and its progeny.

The district court concluded (1) that § 100.22(b) "is virtually the same test stated by Chief Justice Roberts in the majority opinion of [*FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007)]"; (2) that the "support or oppose" language in § 100.57 is not unconstitutionally vague because "these words have even been suggested by the Fourth Circuit as a proper standard to use, *see Leake*, 525 F.3d at 301"; (3) that § 114.15, regulating the permissible use of corporate and labor organization funds, "simply adopted the test enumerated in [*Wisconsin Right to Life*]" and therefore was not unconstitutionally overbroad or vague; and (4) that the "major purpose" test in the Federal Election Commission's policy statement draws its essence from court cases that

determine whether an organization can be regulated by the Federal Election Commission as a PAC.

In determining whether the district court erred in concluding that Real Truth did not make a clear showing that it was likely to succeed, we begin by recognizing that some regulation of speech and political contributions related to campaigns for election is constitutional. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 115-21, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (reciting history of campaign finance regulation and acknowledging that some regulation is necessary to "protect[ ] the integrity of our system of representative democracy"). Supreme Court precedent allows for the regulation of contributions to and expenditures by PACs that are narrowly defined as having "the major purpose" of expressly advocating "the election or defeat of a clearly identified candidate [for federal office]." *Buckley v. Valeo*, 424 U.S. 1, 79-80, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *cf. Leake*, 525 F.3d at 287 (holding that a state campaign finance statute that defined PACs as those having "*a* major purpose," as distinct from "*the* major purpose," to expressly advocate was unconstitutionally overbroad). These opinions also allow for the regulation of corporations and labor unions' communications, prohibiting [*10] them from using general funds to "expressly advocate" for or against the election of a candidate. *See, e.g., Buckley*, 424 U.S. at 28 n. 31, 96 S.Ct. 612; *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Although magic words such as "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat [and] reject" are sufficient to qualify such communications as express advocacy of a particular named official,

Buckley, 424 U.S. at 44 n. 52, 96 S.Ct. 612 (internal quotation marks omitted), a communication without the magic words may still be sufficient as the functional equivalent of the magic words and therefore may be regulated, but "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life,* 127 S.Ct. at 2667; *cf. Leake*, 525 F.3d at 283-84 (holding a North Carolina campaign finance statute unconstitutional where "[t]he very terms of [the] statute—including, but not limited to, 'essential nature,' 'the language of the communication as a whole,' [and] 'the timing of the communication in relation to events of the day' . . . —are clearly 'susceptible' to multiple interpretations").

[**349] Notwithstanding the numerous Supreme Court opinions on the subject, the regulation of speech related to political campaigns remains a difficult and complicated area of law that is still developing. And for that reason, as well as the stringent preliminary injunction standard, Real Truth bears a heavy burden in showing its likelihood of success. Any relaxation of its burden, for example to require that Real Truth show only a *possibility* that it will eventually prevail, would be inadequate. *See Winter*, 129 S.Ct. at 375-76.

When we compare the challenged provisions with those upheld by the Supreme Court, we reach the same conclusion reached by the district court that Real Truth has not, at this preliminary stage in the litigation, made a clear showing that it is likely to succeed on the merits at trial, even though we do not decide the merits nor intend to foreclose any outcome on the merits.

[*11] First, considering the definition of "expressly

advocating" in 11 C.F.R. § 100.22(b), which describes the functional equivalent of the "magic words" specified in § 100.22(a), we cannot conclude that it is likely unconstitutional because the definition is facially consistent with the language in *Wisconsin Right to Life*. Section 100.22(b) provides:

> Expressly advocating means any communication that-
>
> * * *
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because-
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b). This language corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*. See 127 S.Ct. at 2667. In *Wisconsin Right to Life*, the Court stated that where an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," it can be regulated in

the same manner as express advocacy. 127 S.Ct. at 2667; *cf. Leake*, 525 F.3d at 283-84 (holding a North Carolina campaign finance statute unconstitutional where the terms of the [*12] statute that defined express advocacy were "clearly susceptible to *multiple interpretations*" (emphasis added) (internal quotation marks omitted)). And consistent with *Wisconsin Right to Life* and unlike the statute considered in *Leake*, § 100.22(b) cabins the application of the regulation to communications that "could *only* be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" (emphasis added) and where "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.

With respect to 11 C.F.R. § 100.57, Real Truth challenges as unconstitutionally vague the words "*support* or *oppose* the election of a clearly identified Federal candidate" (emphasis added) when used to [**350] identify regulated campaign funds. Section 100.57 defines as follows those monies that will be treated as contributions subject to regulations:

> (a) *Treatment as contributions.* A gift, subscription, loan, advance, or deposit of money or any thing of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received *will be used to support or oppose*

> the election of a clearly identified Federal candidate.

11 C.F.R. § 100.57(a) (emphasis added). Contrary to Real Truth's argument, however, we have expressly sanctioned the challenged language. In *Leake*, we noted that North Carolina "remains free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of one or more clearly identified candidates.'" 525 F.3d at 301. Accordingly, we conclude that Real Truth is not [*13] likely to prevail on its challenge to § 100.57(a), although again we do not decide the ultimate merits of that issue here.

Real Truth also challenges as unconstitutionally vague 11 C.F.R. § 114.15, regulating corporate and labor organization funds expended for certain electioneering communications. That regulation provides:

> Corporations and labor organizations may make an electioneering communication ... to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

11 C.F.R. § 114.15(a). The regulation also provides that "any doubt [concerning whether a communication is an appeal to vote for or against a clearly identified Federal candidate] will be resolved in favor of permitting the communication." 11 C.F.R. § 114.15(c)(3). Again, as with § 100.22(b), § 114.15(a) mirrors the language of *Wisconsin Right to Life* by limiting its application to communications that cannot be interpreted reasonably in any way other than as an appeal to vote for or against a clearly identified federal candidate. *See* 127 S.Ct. at 2667. In view of the fact that § 114.15(a)

mirrors the language of *Wisconsin Right to Life*, we cannot conclude that Real Truth is *likely* to succeed on the merits in challenging this provision as unconstitutional.

Finally, Real Truth challenges the Federal Election Commission's failure to announce a specific major purpose test in its policy statements for enforcement contained at 69 Fed.Reg. 68056 (Nov. 23, 2004) and 72 Fed.Reg. 5595 (Feb. 7, 2007). The major purpose doctrine, as noted by the Federal Election Commission in its policy statements, "operates to limit the reach of the [Federal Election] statute in certain circumstances." 72 Fed.Reg. 5595, 5602. Thus, an organization (corporation or labor union) with activities that center around [*14] something other than electing or defeating a candidate will never have *the* major purpose required by the statute even if it is one of several of the organization's major purposes. The major purpose test is intended to exempt from regulation organizations that expend or contribute money for express advocacy but do not have as the major purpose of their existence the election or defeat of a particular candidate. The Commission explained that "[a]pplying the major purpose doctrine ... requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." *Id.* at 5601. It is this allowance of a case-by-case analysis that Real [**351] Truth challenges as unconstitutionally overbroad.

The approach taken by the Federal Election Commission in this regulation, however, appears simply to be adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contribu-

tions. For example, in *Massachusetts Citizens for Life*, 479 U.S. at 249-51, 107 S.Ct. 616, the Court examined the entire record to conclude that the plaintiff did not satisfy "the major purpose" test. See also *Akins v. FEC*, 101 F.3d 731, 743 (D.C.Cir.1996) (holding that "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant"), vacated on other grounds, *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *Shays v. FEC*, 511 F.Supp.2d 19, 26-31 (D.D.C.2007) (holding that FEC's choice to regulate § 527 groups by determining whether they qualified as political action committees on a case-by-case basis was neither arbitrary nor capricious); *cf. Buckley*, 424 U.S. at 79-80, 96 S.Ct. 612 (announcing "the major purpose" test but not defining how to determine the major purpose of an organization).

In view of the similarity of the approach taken by the Federal Election Commission in its policy statements and the positions taken by the courts, we cannot conclude that Real Truth has carried its heavy burden at this stage of the case of [*15] clearly showing that it is likely to succeed on the merits with regard to the Commission's enforcement strategy.

To justify an injunction before trial on the merits, it is incumbent upon Real Truth to make a *clear showing* that it is likely to succeed at trial on the merits. Because of the close relationship between the text of the provisions challenged and binding court decisions, we cannot conclude that the district court erred in finding that Real Truth failed to meet that burden.

IV.

In addition to the requirement of making a clear

showing that it will likely succeed on the merits at trial, Real Truth was also required to make a clear showing that it was likely to suffer irreparable harm in the absence of the preliminary injunction. *See Winter*, 129 S.Ct. at 374-76.

The district court recognized that chilling speech constitutes irreparable injury. See *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). But it also found that Real Truth was free to disseminate its message and make expenditures as it wished, and its only limitation was on "contributions based on constitutionally permitted restrictions," which the district court determined "[did] not amount to enough harm to constitute irreparable harm."

While the district court's ruling regarding harm was, in effect, an extension of its conclusion that the restrictions were likely constitutional, the district court recognized also that Real Truth had not made a showing that its proposed communications would violate the regulations as written.

Regardless of whether the district court was correct in this regard, we conclude that it acted within its discretion in deter-[*16]mining that any harm created by Real Truth's doubt about the legality of its intended fundraising and advertising was out-weighed by the public interest identified by the Supreme Court in the enforcement of narrow restrictions on contributions to political candidates. *See* [**352] *McConnell*, 540 U.S. at 115-23, 124 S.Ct. 619 (noting the importance of the public interest in "combating the appearance or perception of corruption engendered by large [unregulated]

campaign contributions"); *Mass. Citizens for Life*, 479 U.S. at 264, 107 S.Ct. 616 (noting that the regulations prevent "corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace"); *Buckley*, 424 U.S. at 29, 96 S.Ct. 612 ("[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling"); *Leake*, 525 F.3d at 284 (noting that underpinning Supreme Court campaign finance jurisprudence is a desire to strike "a balance between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech"). The district court also recognized that overruling, on a preliminary basis, regulations that apparently serve these objectives would not be "in the public interest," as required by *Winter*, 129 S.Ct. at 374, and would create a "wild west" of electioneering fundraising and communications. We cannot conclude that it abused its discretion in this regard.

Accordingly, we affirm the district court's order denying a preliminary injunction.

AFFIRMED

[Doc. 72, filed August 5, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff,	)	
v.	)	Civil Action No. 08-1977.
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

[***Editor's Note:*** *Page numbers from the unreported opinion [*] and the online citation, 2008 WL 4416282 [**], are indicated. Only the Westlaw citation is available as of the printing of this appendix.*]

[Doc. 77, filed September 24, 2008]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff,	)	
v.	)	Civil Action No. 3:08-CV-483.
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on two Motions for Preliminary Injunction (Docket Nos. 3 & 53) filed by Plaintiff, The Real Truth About Obama, Inc. filed July 30, 2008. For the reasons expressed below, the Court shall DENY the two Motions.

I. BACKGROUND

A. Factual Background

Plaintiff, The Real Truth About Obama, Inc. ("RTAO"), is a non-profit, Virginia corporation that was incorporated on July 24, 2008. (Compl. for Declaratory and Injunctive Relief, ¶¶ 5, 8.) RTAO is a non-profit,

organized under 26 U.S.C. § 527, making it a political organization that may receive donations and make disbursements for political purposes. (Compl.¶ 9.) Defendants are the Federal Election Commission ("FEC") and the United States Department of Justice ("DOJ"). The FEC is an independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce federal election laws. (FEC Mem. in Opp'n to Pl. Mot. for Prelim. Inj. 1.) The DOJ [*2] has jurisdiction over election laws only to the extent of investigation and prosecution of persons who "knowingly and willfully commit [ ] a violation" of the Federal Election Campaign Act ("FECA"). (U.S. DOJ Mem. in Opp'n to Pl. Mot. for Prelim. Inj. 2.)

RTAO intends to produce an audio ad entitled "Change" and place it on its website. (Compl.¶ 15.) The advertisement states the following:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would like to change America ... about abortion:
>
> 1. Make taxpayers pay for all 1.2 million abortions performed in American each year
> 2. Make sure that minor girls' abortions are kept secret from their parents
> 3. Make partial-birth abortion legal
> 4. Give Planned Parenthood lots more money to support abortion
> 5. Change current federal and state laws so that babies who survive abortions

will die soon after they are born

6. Appoint more liberal Justices on the U.S. Supreme Court.

One thing I would not change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.

(Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?

To learn more real truth about Obama, visit www.TheRealTruthAboutObama.com. Paid for by The Real Truth About Obama.

(Compl.¶ 16.) RTAO intends to broadcast "Change" on the Rush Limbaugh and Sean Hannity radio programs sixty days before the general election (September 5-November 4, 2008). (Compl.¶ 17.) RTAO has produced a second advertisement, which is the subject of [*3] the second Preliminary Injunction Motion, entitled "Survivor." (Pl. Mot. for Second Prelim. Inj. 1-3.) The advertisement states:

(Nurse) The abortion was supposed to kill him, but he was born alive. I couldn't bear to follow hospital policy and leave him on a cold counter to die, so I held and rocked him for 45 minutes until he took his last breath.

[**2] (Male voice) As an Illinois Democrat State Senator, Barack Obama voted three times to deny lifesaving medical treatment to living, breathing babies who survive abortions. For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying.

> Illinois documents from the very committee Obama chaired show he voted against the bill that did contain the clarifying language he says he favors.
>
> Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause.
>
> Paid for by The Real Truth About Obama, Inc.

(Pl. Aff. of Kevin Allen 1.) (emphasis in original).

RTAO also intends to create website-driven digital postcards sending out Senator Obama's public policy positions on abortion. (Compl.¶ 18.) As a way to raise money for the website and content, RTAO intends to use the following fundraising communication:

> Dear x,
>
> I need your help. We're launching a new project to let the public know the real truth about the public policy positions of Senator Barack Obama.
>
> Most people are unaware of his radical pro-abortion views. For example, when he was a state senator in Illinois, he voted against a state bill like the federal Born Alive Infant Protection Act. That bill merely required that, if an abortionist was trying to abort a baby and the baby was born alive, then the abortionist would have to treat that baby as any other newborn would be treated. Under this law, the baby would be bundled off to the newborn nursery for care, instead of being left on a cold table in a backroom until dead. It seems like everyone

would support such a law, but as an Illinois State Senator, Obama did not. There are lots of other examples of his radical support for abortion, and we need to get the word out. That's where you come in.

[*4] A new organization has just been formed to spearhead this important public information effort. It's called The Real Truth About Obama. We plan to do,some advertising. Since we're not a PAC, there won't be any "vote for" or "vote against" type of ads-just the truth, compellingly told.

A central planned project is directed at the world of the Internet. We've already reserved www.TheRealTruthAboutObama.com to set up a website. Here's the exciting part. The website will feature a weekly postcard "signed" by "Barack Obamabortion." Like that? While you are visiting the website, you can send the post card by email to anyone you designate. What could be easier?! And the postcards will be done in a catchy, memorable manner-the sort of thing that zips around the Internet. Each postcard will feature well-documented facts about Obama's views on abortion.

The postcards will also send people to the website for more real truth about Obama, but we also plan to do a radio ad to do that too. This radio ad will give the real truth about Obama's abortion position-all properly documented, of course. Notice the "Truth" part of our name.

[**3] Of course it takes money to develop, host, and maintain a hot-topic website, and to hire the people who specialize in getting things

> noticed on the Internet (it's called viral marketing). So we need your help. We need for you to send us money. As much as you can donate. Right away. We need to get the word out. We know how. We're ready to roll. Now we need you.
>
> Your friend for truth,
>
> x
>
> P.S.-Please send your check today. Time is of the essence. Please send the largest gift you can invest in this vital project. Together we can get the word out.

(Compl.¶ 19.) Lastly, RTAO alleges that it intents to raise more than $1,000 and spend more than $1,000 to broadcast its message, which could trigger FEC regulations. (Compl.¶ 19.)

B. Procedural Background

RTAO incorporated in July 24, 2008 and shortly thereafter filed these motions. (Def. FEC Mem. 1.)

RTAO has brought a facial and as-applied constitutional challenge to three election law-related regulations, 11 C.F.R. § 100.22, 11 C.F.R. § 100.57, and 11 C.F.R. § 114.15, [*5] and the FEC's enforcement policy regulating determination of political action committee ("PAC") status. (Compl.¶¶ 1, 2.) RTAO believes that its advertisement, solicitation, and the activities of the organization will place it within the realm of regulations 11 C.F.R. § 100.22, 11 C.F.R. § 100.57, and will be deemed a political action committee ("PAC") by the FEC. (Compl.¶ 21.) Because of these regulations, Plaintiff asserts that its rights have been chilled because of the unconstitutionality of the provisions. Further, Plaintiff alleges that because the FEC defini-

tion of "express advocacy" is overbroad, it will be restricted by 11 C.F.R. § 114.15, which is also unconstitutional.

For these reasons, Plaintiff asserts that the regulations and enforcement policy are void and should be set aside under the Administrative Process Act ("APA"). (Compl.¶¶ 1, 2.) Plaintiff asks for a preliminary and permanent injunction "enjoining the FEC and DOJ from enforcing FECA based on the regulations and policy .... to RTAO and to its intended activities," (Compl.¶ 2) but also to "all other entities similarly situated." (Compl. 19, Pl. Prayer for Relief ¶ 2.)

II. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is "an extraordinary remedy," one "to be granted only sparingly." *In re Microsoft Litig.*, 333 F.3d 517, 524 (4th Cir.2003); *accord Microstrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir.2001). It "maintains a particular relationship between the parties" to a case before it is decided on its merits. *United States Dept. of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4th Cir.2006). Accordingly, whether a preliminary injunction is warranted depends on the relative effect on the parties [*6] of maintaining the status quo, as well as the public interest in doing so. *Id.* And, a preliminary injunction may not grant relief of a character that could not ultimately be granted. *In re Microsoft Litig.*, 333 F.3d at 525.

[**4] A court deciding whether to issue a preliminary injunction must weigh four factors: (1) the likelihood of irreparable harm to the plaintiff if its request for relief is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits

of its claim; and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir.1977); *accord Wolf Run Mining Co.*, 452 F.3d at 280.

The United States Supreme Court has not specified the order in which a court should analyze these factors, nor the weight that they should be given. *See Globe Nuclear Svcs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir.2004). In some decisions, the Fourth Circuit has declared that the first two factors-the "balancing of harms" test-are the most important. *See, e.g., Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir.1991). In *Blackwelder*, the Fourth Circuit declared that a court deciding whether to grant a preliminary injunction must first compare the likelihood of irreparable harm to the plaintiff to the likelihood of harm to the defendant and if "a decided balance of hardship" in the plaintiff's favor results, then a preliminary injunction is warranted if the plaintiff's claims involve serious, difficult questions. 550 F.2d at 195. As the probability that the plaintiff will suffer irreparable harm decreases, the importance of the third factor-the strength of the plaintiff's case-increases. *Id.* Although the Fourth Circuit [*7] has adopted this approach on several occasions, it recently cautioned that focusing on the "balancing of harms" test is contrary to Supreme Court precedent. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 n. 2 (4th Cir.2002).[1]

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[1] In *Scotts*, the Fourth Circuit stated "*Blackwelder's* emphasis on the balancing of the harms rather than the likelihood of success has been criticized, even within this court, as inconsistent with Supreme Court

The Fourth Circuit has recently held that, in a case —such as the one before this Court—"when 'the irreparable harm that [the plaintiff] has alleged is inseparably linked to his claim of a violation of his First Amendment rights ... analysis of [the plaintiff's] likelihood of success on the merits becomes the first and the most important factor for a court to consider." *Ctr. for Individual Freedom, Inc. v. Ireland*, No. 1:08-190, 2008 WL 1837324, at *2 (S.D.W.Va. Apr.22, 2008) (quoting *Newsom ex rel. Newsom v. Abermarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003). For that reason, the Court will analyze RTAO's likelihood of success on the merits of the claim before tackling the other preliminary injunction factors.

The party seeking the preliminary injunction bears the burden of proving that each factor supports granting relief. *Direx Israel*, 952 F.2d at 812; *Fairfield Resorts, Inc. v. Fairfield Mountains Prop. Owners Ass'n, Inc.*, 2007 WL 186537, *4 (W.D.N.C. Jan.22, 2007); *see Granny Goose Foods, Inc., v. Bhd. of Teamsters & Auto. Truck Drivers Local* [*8]*No. 70*, 415 U.S. 423, 442-43, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974).

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precedent. See *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 868 (4th Cir.2001).... In the course of their challenges to the preliminary injunction, the defendants ask that we 'restate the standards for a preliminary inunction to restore clarity to [our] jurisprudence.'" *Scotts*, 315 F.3d at 271 n. 2. The Court stated however, that they "cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting en banc can do that." *Id.* (citing *Mentavalos v. Anderson*, 249 F.3d 301, 312 n. 4 (4th Cir.2001).

III. DISCUSSION

A. Brief History of the FECA and BCRA

[**5] The history of election and campaign regulatory law was discussed quite aptly in *McConnell v. FEC*, 251 F.Supp.2d 176, 188-206 (D .D.C.2003) and has been reiterated several times since. The following is a brief history of FECA and the presently-challenged regulations. FECA was enacted in 1971 in order to reform the nation's federal campaign finance laws. Part of these reforms included requiring disclosure of certain contributions and disclosure of expenditures by all candidates and political committees who spend more than $1,000 per year. Pub.L. No. 92-255, 86 Stat. 3; *McConnell v. FEC*, 540 U.S. 93, 118, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The law also included the prohibition on the use of corporate and union general treasury funds for contributions and expenditures. *McConnell*, 540 U.S. at 118. Political Action Committees ("PACs") were created to allow for separate election-related contributions and expenditures of corporations and unions. *Id.*

FECA was reformed in 1976 by the Federal Election Campaign Act Amendments of 1976, which closed the loopholes left in the original 1972 bill. *See* Pub.L. No. 94-283, 90 Stat. 475. These amendments further limited contributions, required reporting if contributions or expenditures exceeded a certain limit and created the FEC to regulate and enforce the legislation. *Id.* FECA was challenged in the landmark federal campaign finance reform case, *Buckley v. Valeo* where, among other things, the definition of express [*9] advocacy and the provisions for expenditures and contributions were fine-tuned into the regulations of today. *See* 424 U.S. 1, 14-23, 96 S.Ct. 612, 46 L.Ed.2d

659 (1976).

More loopholes were discovered as FECA became integrated into American electoral politics, and in 2002 Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub.L. No. 107-155, 116 Stat. 81. The provisions of BCRA attempt to limit the use of nonfederal funds by political parties and prohibit labor unions and corporate treasury funds from being used to contribute to advertisements with a federal electioneering purpose. *McConnell v. FEC*, 251 F.Supp. 176, 205-06 (D.D.C.2003).

The regulations being challenged here were adopted from the court decisions and statutes adopted by Congress to combat improper electioneering communications. 11 C.F.R. § 100.22 went into effect after the decisions in *Buckley*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL* "), and *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.1987), enumerated the meaning of "express advocacy." 60 Fed.Reg. 52069 (Oct. 5, 1995). 11 C.F.R. § 100.57 became effective on January 1, 2005, and was enacted to clarify the definition of contribution in the world of campaign finance. *See* 69 Fed.Reg. 68,056 (Nov. 23, 2004). The definition used by the FEC to determine PAC status—the "major purpose" test—has not been officially ratified as a regulation, but has been adopted into a FEC Explanation and Justification Notice put out by the FEC as recently as 2007. *See* 72 Fed.Reg. 5595 (Feb. 7, 2007). Finally, 11 C.F.R. § 114.15 was adopted to incorporate the language adopted in *FEC v. Wisconsin Right to Life, Inc.*, --- U.S. ----, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) ("*WRTL*") to determine electioneering communication funding by corporations or [*10] unions. 72 Fed.Reg. 72,899,

72,902 (Dec. 26, 2007).

B. Jurisdiction/Standing Arguments

[**6] Before analyzing the claims asserted under the Preliminary Injunction standard, Defendant FEC has argued several standing requirements that should be addressed. The FEC argues that Plaintiff lacks standing because RTAO's activities will not come under FEC oversight through the challenged regulations. The FEC states that Plaintiff's activities will not fall under sections 100.22(a), (b), 100.57, or 114.15, therefore there is no threat of litigation, and therefore, no case or controversy. (Def. FEC Mem. 6.)

1. Section 100.22

In Defendant FEC's response, the FEC states that Plaintiff's ad, "Change," would not fall under the express advocacy definition, either (a) or (b)[2] ,there-

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[2] The language of the rule states:

Expressly advocating means any communication that-

> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign

fore there is no viable [*11] threat of litigation. (Def. FEC Mem. 6.) The FEC asserts that "[r]easonable minds could ... differ as to whether [the ad] encourages actions to ... defeat" Senator Obama, therefore the FEC argues that the fact that reasonable minds could differ places the advertisement outside the scope of section 100.22, therefore making this an unripe controversy.

> slogan(s) or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because-
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

11 C.F.R. § 100.22 (1995).

(Def. FEC Mem. 12.) Defendant FEC admits, however, that RTAO's "Survivor" ad is unquestionably express advocacy. (Def. Mem. in Opp'n to Second Prelim. Inj. 1.) Because these claims are pro-active, not retroactive, FEC concludes that the overbreadth challenge to these regulations is invalid because "a party asserting overbreadth standing must still demonstrate a 'distinct and palpable injury.'" *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.2d 626, 634 (4th Cir.2007).

The Supreme Court has held that to satisfy the constitutional standing requirements for an as-applied challenge, "a plaintiff must establish that he or she has (1) suffered an injury in fact, which is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) which is fairly traceable to the challenged act, and (3) is likely to be redressed by a favorable decision." *EMILY's List v. FEC*, No. 05-0049, 2008 WL 2938558, at *12 (D.D.C. July 31, 2008) (citing *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996). In *EMILY's List*, Plaintiff's assertion was that it was [*12] "unable, without risking enforcement action by the FEC, to conduct its nonfederal activities without complying with draconian federal financing rules." *Id.* at *15. The FEC, in that case, challenged standing because, it asserted, Plaintiff was not prohibited "from engaging in electoral speech" and it "had not been required to alter its practices as a result of the new 50% federal funds" requirements. *Id.* at *12. The Court found that standing was proper because Plaintiff "*actually altered* its communications" and "would have preferred to include a reference to a clearly identified federal candidate ... but declined to do so because it would have required EMILY's List to fund the advertisements

entirely with federal funds." *Id.* Further the Court found that EMILY's List "has ordered its conduct in ways it otherwise would not have, in order to comply with the new allocation and solicitation regulations," and this was enough for standing for the Plaintiffs. *Id.*

[**7] The Court in *EMILY's List* noted, however, that Plaintiff brought a facial challenge to the rules, not an as-applied challenge, and the standard for a facial challenge is that "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court-those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Id.* at 14 (quoting *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) (internal quotations omitted). For the facial challenge standing argument, the Court held that even though Plaintiff had failed to "include specific allegations for First Amendment injuries suffered by parties not before the Court," the fact that EMILY's List had altered its own conduct to conform with the regulation implies that "other political committees likely [*13] have as well," giving the Court sufficient evidence "to tilt the balance and conclud[e] that EMILY's List has standing to assert its facial challenge." *Id.* Additionally, the Fourth Circuit has held,

> When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. A non-moribund statute that "facially restrict[s] expressive activ-

> ity by the class to which the plaintiff belongs" presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary. This presumption is particularly appropriate when the presence of a statute tends to chill First Amendment rights.

North Carolina Right to Life v. Bartlett, 168 F.3d 705, 710 (4th Cir.1999).

a. As-applied challenge

In this case, Plaintiff has filed both an as-applied and a facial challenge to the FEC regulations and rules. Regarding the as-applied challenge, even with the FEC's assertions-that Plaintiff's communication in the ad "Change" does not fall within the challenged regulations-this Court held that the threat of litigation "initiated by a private citizen" is still a legitimate fear, enough to satisfy the standing requirements. *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668, 674 (E.D.Va.2000) ("*VSHL*") (finding that FECA permits private individuals to sue to enforce FECA and that this "mere possibility that such a challenge may be brought by a private citizen is enough" to "pose a very real threat of prosecution."). Because a private individual could bring a challenge here, this should be satisfactory for standing. Furthermore, in reading the "Change" ad, it is clear that reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama. The fact that the ad uses terminology satirizing the motto of the Obama [*14] campaign-Change-and attacks the Senator on a very hot-button issue-abortion-it is clear the threat of litigation is present because of these ad's contents. A private citizen exposed to the "Change" ad may bring

private civil litigation against RTAO, and would be justified in thinking that this advertisement should be regulated by section 100.22. This satisfies the standing requirement because Plaintiff "faces a credible threat of prosecution under a criminal statute." *See Bartlett*, 168 F.3d at 710.

[**8] Moreover, RTAO has filed a second preliminary injunction motion for another ad created entitled "Survivor," which the FEC has conceded will fall within the "express advocacy" provisions of 11 C.F.R. §§ 100.22, 114.15. (Def. FEC Mem. in Opp'n to Pl's Second Prelim. Inj. Mot. 4-6). Because a legitimate future threat of litigation is present with regard to the "Survivor" ad, and there is a current threat of private party litigation with regard to the "Change" ad, it is clear that a proper "case or controversy" exists with the as-applied challenge to the constitutionality of the challenged provisions.

b. Facial challenge

With regard to the facial challenge, a similar argument as the one presented in *EMILY's List* is present here. Plaintiff has failed to allege that other parties not before the Court have or are suffering First Amendment violations as was the case in *EMILY's List*. *See* 2008 WL 2938558, at *14. However, it was not fatal to plaintiffs in that case, nor should that be the case here. It is arguable that because it is an election season and RTAO has had to alter its conduct because of the FEC regulations, it is likely other individuals have considered creating advertisements, similar to those produced by RTAO. This should be enough to find standing for Plaintiff's facial challenge. If not, it is clear that RTAO has [*15] satisfied standing for the as-applied challenge, and therefore jurisdic-

tion is proper in this Court.[3]

The same arguments apply to the challenged provisions sections 100.57 and 114.15, therefore the standing challenges to these sections fail as well.

2. PAC status-"Major Purpose"

The FEC asserts that RTAO's claim of unconstitutionality of the PAC test is not justiciable because RTAO would not qualify as a PAC, therefore there is only an abstract inquiry that is "not ripe or otherwise

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[3] The Department of Justice has also asserted a lack of standing argument against RTAO's preliminary injunction motion. (Def. DOJ Mem. 1-4.) The DOJ asserts that the FEC has the "statutory authority to interpret FECA" and that the DOJ's authority "is limited to investigating and prosecuting persons who 'knowingly and willfully commit[ ] a violation of FECA or other federal criminal statutes.'" (Def. DOJ Mem. 2 (citing 2 U.S.C. § 437g(d)(1)). The DOJ asserts that "Plaintiff cannot show that it has an objectively reasonable fear that engaging in the activities described in its complaint will expose Plaintiff to criminal prosecution" based on the FEC's position that the proposed ad is not within the scope of the regulations. As stated above, in reading the "Change" and "Survivors" ads, it is clear both are expressly advocating the defeat of Senator Obama, and the fact that the DOJ is relying solely on the FEC's claim that the "Change" ad does not fall under regulations is not enough to dismiss for lack of standing. If the FEC were wrong and this case does fall under express advocacy, then the DOJ would be free to commence criminal prosecution proceedings. For this reason, the DOJ's claim of standing is rejected.

fit for judicial resolution." (Def. FEC Mem. 23.) The FEC's position is based solely on Plaintiff's statement in the complaint that "[RTAO] is not a ... PAC under FECA because none of its communications will qualify as either a "contribution" or "expenditure" ... It is also not a PAC because, ... RTAO does not meet the constitutionally required 'major purpose' test." (Compl. ¶¶ 10-11.) Plaintiff believes that it will be classified as a PAC by the FEC because the FEC's position that it is entitled to consider a variety of factors when considering PAC status, and the consideration of such [*16] factors will make RTAO a PAC. (Compl. ¶¶ 11-13.) Further, Plaintiff states that it "reasonably believes" it will be subject to an FEC and DOJ investigation and a possible enforcement action potentially resulting in civil and criminal penalties based on the FEC's alleged unconstitutional regulations involving "express advocacy," "contributions," and the "major purpose test" for determining PAC status. (Compl.¶ 21.)

Again, these present similar conclusions as the standing arguments of sections 100.22, 100.57, and 114.15. For this reason, Defendant FEC's claim that standing is not proper must fail.

3. Final Agency Action

[**9] The FEC also takes the position that the policy challenged by the Plaintiff regarding the definition of "political committee" is not final agency action, therefore, this claim is not reviewable under the Administrative Procedure Act. Final agency action combines the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Pac. Coast Fed. of Fisherman's Assn. v. Gutierrez*, No. 1:06-CV-245, 2007 WL 1752289,

*7 (E.D. Cal. June 15, 2007) ("Whether an action constitutes a final agency action is premised on the observation that the action has 'no direct consequences' and services 'more like a tentative recommendation than a final binding determination.' In other words, if the agency action is purely advisory and in no way affects the legal rights of the relevant actors it is not a 'final agency action' under the APA.") (internal citations omitted).

The FEC is alleging that RTAO is challenging the Explanation and Justification set [*17] forth in 72 Fed.Reg. 5595, and that this Explanation and Justification is not final agency action because it explains why a broader regulation was not adopted. (Def. FEC Mem. 24.) Plaintiff's challenge to the definition of "political committee" is still valid, because the rule establishing what the FEC would consider as a "political committee" is a standard set by the FEC, even absent a definition. The U.S. District Court for the District of Columbia ruled in 2007 that the FEC was permitted to refrain from ascertaining a specific rule for "major purpose," but this does not mean the rights and obligations of parties cannot be determined from the FEC's enforcement of the term "major purpose." See *Shays v. FEC*, 511 F.Supp.2d 19, 31 (D.D.C.2007).

While there is no specific definition for "major purpose," the rights and obligations of parties can still be determined from the FEC rule, as enforcement power exists through the judicial construct of the term "major purpose." Therefore, Defendant's claim that the challenged rule is not reviewable under the APA because it is not a final agency action fails.

C. Likelihood of Success Claims

1. "Express Advocacy" Claim-11 C.F.R. § 100.22

Plaintiff asserts that 11 C.F.R. § 100.22(b) is void on its face because it is vague and overbroad, a violation of the First and Fifth Amendments to the U.S. Constitution. (Pl.Compl.¶ 29.)

Section 100.22(b) provides the definition of express advocacy, a term that is critical to electioneering communication regulations because corporations and labor unions may be [*18] constitutionally prohibited from using general funds to "expressly advocat[e]" for or against the election of a candidate. *McConnell*, 540 U.S. at 203 (2003); *MCFL*, 479 U.S. at 249. RTAO, a corporation that would be restricted by this provision, argues that the test codified in section 100.22(b) is void because it is vague.

In *Buckley v. Valeo*, the Supreme Court found that express language, deemed "magic words," were required in order to find the express advocacy that may be constitutionally limited through expenditure restraints.[4] 424 U.S. 1, 44, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). From that decision, the FEC promulgated section 100.22. The general test in *Buckley* was adopted by the Ninth Circuit in *Furgatch*, 807 F.2d 857 (9th Cir.1987), where the court acknowledged the express advocacy test, but stated "speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events,

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[4] Such magic words include "vote for," "elect," "support," and are included in 11 C.F.R. § 100.22(a), the preceding subsection to the subsection in dispute here.

be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864-65.

[**10] This Court, in *VSHL*, found section 100.22 to be unconstitutional, rejecting the Ninth Circuit's adoption of the regulation in *Furgatch*. *VSHL*, 83 F.Supp.2d at 676. This Court based its decision on the distinction made in *Buckley* between "express advocacy," that which in "express terms advocate the election or defeat of a clearly identified candidate," and "issue advocacy," which is not regulated by the FEC because the exchange of ideas is strongly protected by the First Amendment. *Buckley*, 424 U.S. at 14, 44.

[*19] This Court ruled that because section 100.22(b) regulated speech that did not contain the "magic words" of express advocacy, the FEC had exceeded their statutory authority. *VSHL*, 83 F.Supp.2d at 677 (noting that the *Buckley* court stated that express advocacy contains explicit words, while "issue advocacy" does not. 424 U.S. at 44.). The Fourth Circuit affirmed this decision as far as the unconstitutionality of section 100.22(b), but stated that this Court's grant of a permanent injunction nationwide was too broad and should have only reached as far as the Fourth Circuit. *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir.2001). Even though the Fourth Circuit affirmed this Court's decision, a clear statement was made that whether the express advocacy requirement imposed by the court was too strict and therefore would corrupt the idea of federal election laws, could only be changed or affirmed by "an imaginative Congress or from further review by the Supreme Court." Id. at 392.

Such review by the Supreme Court occurred. In

2003, the Supreme Court held in *McConnell v. FEC* that the *Buckley* Court's "express advocacy restriction was an endpoint of statutory interpretation, not a first principal of constitutional law." 540 US. at 190. In that case, the Court upheld BCRA's prohibition of corporation-funded communications that refer to federal candidates that did not have the "magic words." Id. at 206. Justice Thomas's dissent stated that their decision in *McConnell* "overturned" all of the Courts of Appeals decisions, including past Fourth Circuit decisions in *FEC v. Christian Action Network, Inc.*, 100 F.3d 1049 (1997) and *VSHL*. This "overturning" of the Fourth Circuit decisions was not express, and the Supreme Court has not specifically stated that the [*20] decision in *VSHL* is no longer good law. However, from *McConnell* and the recent decision in *WRTL*, a new test has emerged virtually overruling this Court's decision in *VSHL*. In *WRTL*, the Supreme Court upheld the BCRA restriction on corporate electioneering communications that are communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. In upholding the BCRA restriction, the Court enumerated a test for determining if something is the "functional equivalent" of express advocacy-and thereby subject to the constitutional limitations. *Id.* The test states that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* No element of "magic words" was implicated in *WRTL*, thereby impliedly upholding the decision in *McConnell* that the use of "magic words" was a form of "statutory interpretation not [a] constitutional command." *McConnell*, 540 U.S. at 191-92.

[**11] Most recently, the Fourth Circuit in *North Carolina Right to Life, Inc. v. Leake*, held a state statute invalid for defining express advocacy beyond the permitted scope. 525 F.3d 274 (4th Cir.2008). The Court held that the statute was invalid because it defined express advocacy using specific "contextual factors" such as "the timing of the communication in relation to the events of the day" and "the cost of the communication." *Id.* at 298. Consideration of these factors went well beyond *WRTL*'s functional equivalent of express advocacy test. *Id.* at 297. After holding that the statute was invalid, the Court stated that "North Carolina remains free to adopt a definition of express advocacy consistent with the [*21] standards approved by *McConnell* and *WRTL*." Id. at 301.

In the present case, RTAO's first assertion of unconstitutionality is that section 100.22(b) is unconstitutional because it gives an alternative method of finding express advocacy not supported by Supreme Court precedent. However, the test in section 100.22(b) is the same analysis as was enumerated in *WRTL*. *WRTL* required that the ad be deemed express advocacy "only if the ad is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667. Section 100.22(b) states that express advocacy can be found if "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." Because section 100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of *WRTL*, and that decision supercedes this Court's decision in *VSHL*, the test enumerated in section 100.22(b) to determine express advocacy is constitutional.

RTAO's second assertion of unconstitutionality is that the test is vague because it permits considerations of context (Compl.¶¶ 29-33,) however the Supreme Court has clearly permitted such considerations. *WRTL*, 127 S.Ct. at 2669 (holding that courts "need not ignore basic background information that may be necessary to put an ad in context-such as whether an ad 'describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future.' ").

For this reason, and the reasons stated above, Plaintiff's assertion of [*22] unconstitutionality of section 100.22(b) is unlikely to succeed on the merits. As a showing of likelihood of success on the merits is a key factor in determining whether or not to enjoin a particular action, Plaintiff's claim should fail as to section 100.22, thereby prohibiting injunction.

2. Solicitation Rule Claim-11 C.F.R. § 100.57

RTAO further claims that the solicitation rule enumerated in section 100.57 is unconstitutionally vague and overbroad. (Compl.¶ 36.) Section 100.57 deals with funds received in response to solicitations and whether such funds are considered "contributions." The language of the regulation is:

> [**12] (a) Treatment as contributions. A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to *support or oppose* the election of a clearly identified Federal candidate.

11 C.F.R. § 100.57 (emphasis added). Plaintiff asserts that the use of the terms "support or oppose" are not specific enough, are undefined, and "give inadequate notice to enforcers and the regulated community of what these words encompass." (Compl.¶ 36.)

The Supreme Court in *Buckley* also dealt with the definitions of "contribution" and "expenditure" and found different constitutional requirements in the two terms. The Court stated that the term "contribution" did not need to be as narrowly tailored as "expenditure" because contributions have "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. The Court defined contribution to include, "not only contributions made directly or indirectly to a candidate, [*23] political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate." *Id.* at 78. Thus, the *Buckley* Court created a broad standard for contributions. The Court construed expenditure narrowly to encompass "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" while finding that express advocacy is not confusing when tied to contributions because "of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.*, at 24, 79-80. The Second Circuit further defined "earmarked for political purposes" by stating that communications may still fall within the reach of the pre-BCRA statute if "the contributions will be targeted to the election or defeat of a clearly identified candidate." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir.1995). Very recently, the U.S. District Court of the

District of Columbia failed to enjoin application of section 100.57 and upheld the constitutionality of the section in *EMILY's List*, 2008 WL 2938558 (upholding the constitutionality of section 100.57); *EMILY's List v. FEC*, 362 F.Supp.2d 43 (D.D.C.2005) (denying the preliminary injunction). In *EMILY's List*, the court specifically upheld the use of "support or oppose" in the regulation because these words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." 2008 WL 2938558, at *29 (citing *McConnell*, 540 U.S. at 170 n. 64 ("[T]hese words provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.")). Because a person of ordinary intelligence could determine the meaning of support or oppose, the Court found [*24] the regulation to be constitutional and not vague or overbroad.

[**13] Plaintiff RTAO cites several cases where statutes that contained "support or oppose" were found to be unconstitutional, however, none of the cases cited refer to the terms "support or oppose" as the offending terms. In *Leake*, the Fourth Circuit found the statute unconstitutional because the method of determining applicability was vague and overbroad, but stated clearly that North Carolina was "free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of 'a clearly identified candidate.'" 525 F.3d at 301. By doing this the Court made clear the offending portion of the North Carolina statute was not the use of the terms "support or oppose," and suggested that these terms would be an appropriate standard for a revision

of the statute. Further in *Bartlett*, the Court invalidated a statute defining "political committee" as any group "the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence the result of an election." 168 F.3d at 712. The offending part of this statute was the term "or to influence the result of an election," not "support or oppose." *Id.* This was also the case in *Ctr. for Individual Freedom v. Carmouche,* where the Fifth Circuit narrowly construed the use of the term "or otherwise influencing" in the definition of "expenditure" to avoid unconstitutionality of the definition. 449 F.3d 655, 663 (5th Cir.2006). The Fifth Circuit made no reference to the necessity to narrowly construe the term "support or oppose."

Because the case law and Supreme Court precedent make it clear that the use of "support or oppose" is not unconstitutionally vague, and these words have even been [*25] suggested by the Fourth Circuit as a proper standard to use, *see Leake*, 525 F.3d at 301, it is unlikely Plaintiff would succeed on the merits of its claim that section 100.57 is unconstitutional. For this reason, an injunction would be improper as to this particular claim.

3. "Major Purpose" Test Claim

Plaintiff next contends that the FEC's PAC status policy goes beyond the test enumerated in *Buckley*, therefore going beyond its statutory authority and is, therefore, void. In *Buckley*, the Supreme Court stated that political committees are "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. "*Buckley*, 424 U.S. at 79 (emphasis added). The Court goes on to say that expenditures of political committees

are "campaign related." *Id.* This is the "major purpose" test referred to by the parties and is currently the standard as to how to determine whether an organization can be regulated by FECA as a PAC. The *Buckley* court did not elaborate on what a major purpose is, but in *MCFL*, the Court held that a right-to-life organization did not fit the standard set forth in *Buckley* because the "central organizational purpose is issue advocacy." *MCFL*, 479 U.S. at 252 n. 6 (emphasis added).

[**14] To determine what a "major purpose" is, courts have permitted evaluation of public statements, an organization's spending or contributions, letters to primary contributors, and other non-public statements. *See FEC v. Malenick*, 310 F.Supp.2d 230, 234-37 (D.D.C.2004); *FEC v. GOPAC*, Inc., 917 F.Supp. 851, 859, 864, 866 (D.D.C.1996). Courts have even mentioned that when an entity organizes itself as a 527 it "is inherently indicative of its [*26] choice to principally engage in electoral activity, which goes a long way to satisfying the major purpose test." *Shays v. FEC*, 511 F.Supp.2d 19, 30 (D.D.C.2007). A declaration by the organization that they are not incorporated for an electioneering purpose is not dispositive. *See Akins v. FEC*, 101 F.3d 731, 743 (D.C.Cir.1997) ("[I]t is the purpose of the organization's disbursements, not that of the organization itself, that is relevant.") (emphasis added). The *Shays* court states that "various activities and statements" must be examined to determine the major purpose. 511 F.Supp.2d at 31.

The FEC rule is flexible with a "case-by-case analysis" of conduct including spending on Federal campaign activity, spending on other activities, analysis of public statements, declaration of purpose on website, fund-

raising appeals, and similar types of activities. 72 Fed.Reg. 5595, 5602. Because the FEC rule employs the same factors the Supreme Court has approved in these aforementioned cases, Plaintiff's claim of overbreadth appears to be lacking and therefore will likely not succeed on the merits.

RTAO further alleges that the FEC has failed to incorporate the *Buckley* standard and has therefore gone beyond its statutory authority by making the major purpose test to focus on "*federal* campaign activity." (Compl.¶ 79) (emphasis added). There is really no difference between "campaign related," as enumerated in *Buckley*, and "campaign activity" as the FEC codified in the regulation. 72 Fed.Reg. at 5601. Defendant clarifies the reason it states "federal campaign activity," is to make clear major purpose test applies only to the election of federal candidates, not state or local ones. (Def. FEC Mem. 26.)

Because the FEC rule appears to consider the same factors as have been supported [*27] and encouraged by the courts in determining a "major purpose," Plaintiff fails to demonstrate a likelihood of success on the merits with respect to this issue.

4. Permissible Use of Funds Claim–11 C.F.R. § 114.15

Lastly, RTAO asserts that 11 C.F.R. § 114.15 is unconstitutionally vague because it goes beyond the test enumerated in *WRTL*. (Compl.¶ 50.) Section 114.15 regulates the permissible use of corporate and labor organization funds for certain electioneering communications. 11 C.F.R. § 114.15. If an electioneering communication contains express advocacy, then the communication may be constitutionally regulated. *See id.* In *WRTL*, the Supreme Court held that only those advertisements which were found to be "express advo-

cacy" or "the functional equivalent of express advocacy" could be restricted; all other limitations were unconstitutional. 127 S.Ct. 2670. In order to determine whether an advertisement is "express advocacy" the Court stated that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than that as an appeal to vote for or against a specific candidate." *Id.* at 2667. The Court continued by providing reasons why *WRTL*'s ad was not express advocacy or the functional equivalent of express advocacy:

> [**15] First their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take position on a candidate's character, qualifications, or fitness for office.

Id. By doing a side-by-side comparison, it is very apparent that the FEC's regulation simply [*28] adopted the test enumerated in *WRTL* to create the electioneering communication regulation in section 114.15. Subsection (a) states that restrictions on electioneering communications are limited to those which are "susceptible to no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate ." 11 C.F.R. § 114.15(a). This is virtually the same definition enumerated in *WRTL*. Further, the factors given in subsection (c) are those which were given to find the unconstitutionality

in *WRTL*. *Compare WRTL*, 127 S.Ct. at 2667, *with* 11 C.F.R. § 114.15(c). Additionally, subsection (c)(3) states that "any doubt will be resolved in favor of permitting the communication." *Id.* at (c)(3). It is clear that the regulation adopted by the FEC is precisely what the Supreme Court dictated should be the standard, and furthermore, the FEC broadened the rule by permitting that the disputes be decided in favor of communication, not restriction.

WRTL and *Leake* discuss the avoidance of "open-ended rough-and-tumble of factors" but only to the extent that an objective standard should be adopted in evaluating the substance of a communication, not the "intent and effect." *WRTL*, 127 S.Ct. at 2666; *Leake*, 525 F.3d at 282. The provisions contained in 11 C.F.R. § 114.15 are the exact factors the Court used in *WRTL* to find that no express advocacy, or its functional equivalent existed. The Court has not shunned the use of factors, but has simply insisted on the use of objective standards. *WRTL*, 127 S.Ct. at 2666. For these reasons, Plaintiff's assertion that section 114.15 is overbroad and vague is misplaced, and therefore RTAO fails to carry its burden of proving a likelihood of success on the merits.

[*29] For the reasons stated above, the likelihood of Plaintiff's success on the merits of all four claims of unconstitutionality is unlikely.

D. Irreparable Harm

The next analysis to consider in a Preliminary Injunction is irreparable harm to the Plaintiff if the preliminary injunction is not granted. This Court has held that "when an individual's free speech rights are infringed, irreparable harm is generally inflicted." *Virginia Society for Human Life, Inc. v. Caldwell*, 906

F.Supp. 1071, 1077 (1995) (citing *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). In that case, Plaintiff was alleging unconstitutionality of a Virginia statute restricting the distribution of issue advocacy "voter guides. *Id.* at 1071. The court found the degree of harm to the Plaintiff was determined to be greater than the degree of harm to Defendant, because the only harm attributable to the Defendant was that voters would have less information about the origins of issue advocacy literature. *Id.* at 1077. Also, in *Ireland*, the court was faced with a similar challenge of vagueness and overbreadth regarding regulations concerning corporate financing of elections for public office and found "because of this vagueness, it is fair to say that the Center has been discouraged from engaging in speech safeguarded by the First Amendment. This chill standing alone, constitutes irreparable injury." 2008 WL 1837324, at *5.

[**16] While RTAO asserts a chilling of speech which would constitute an irreparable harm, the evidence presented at the Hearing was clear: Plaintiff is free to disseminate their message and make any expenditures they wish. Their only limitation is on contributions based on constitutionally permitted restrictions. This Court finds that this does not amount [*30] to enough harm to constitute irreparable harm.

E. Balance of Harms and Public Policy

The next two factors, harm to Defendant and considerations of public policy, in this case, are intertwined. The Supreme Court has stated that "[t]he presumption of constitutionality which attached to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balanc-

ing hardships." *Walter v. Nat'l Ass'n of Radiation Survivors,* 468 U.S. 1323, 1324, 105 S.Ct. 11, 82 L.Ed.2d 908 (1984) (citing *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 97 S.Ct. 776, 50 L.Ed.2d 739 (1977)). The Fourth Circuit found no harm to the defendant school board in *Newsom* because the Court found the regulation in question was likely unconstitutional, therefore enjoining its enforcement would cause no harm to the defendant. *Newsom*, 354 F.3d at 261. However, in this case, presumption of validity of the regulation must fall in favor of Defendants when considering balancing hardships. Furthermore, it is unlikely the regulations will be found unconstitutional, so the harm to Defendant is likely should the injunction be granted. Additionally, "enjoining the disputed rules would undermine the FEC's efforts ... because in place of the regulations, the public would find these portions of campaign finance laws suddenly unregulated." *EMILY's List*, 2008 WL 2938558, at *59. Should this Court enter the injunction, the next two months of election law and enforcement would likely become a "wild west" of electioneering communication and contributions without the challenged regulations in place. Defendant effectively argues that "enjoining application of the [*31] challenged provisions could confuse political actors, allow improper use of corporate funds in the election process, sanction excessive campaign contributions, and deprive the public of important information." (Def. FEC Mem. 10-11.) For these reasons, the two factors of balancing harms and public policy considerations weigh in favor of Defendants.

IV. CONCLUSION

Because Plaintiff has failed to carry its burden of showing a likelihood of success on the merits and the balance of harms and public policy considerations weigh in favor of Defendants, this preliminary injunction motion is DENIED.

An appropriate Order shall issue.

[Doc. 65, filed September 11, 2008]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff,	)	
v.	)	Civil Action No. 3:08-CV-483.
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

ORDER

THIS MATTER is before the Court on Plaintiff's Motions for Preliminary Injunctions (Docket Nos. 3, 53), Consolidation of Hearing with Trial on the Merits (Docket No. 5), to Expedite this matter (Docket No. 6), and Consolidation of Hearings for both Preliminary Injunctions (Docket No. 58). Upon due consideration, and for the reasons stated in the Memorandum Opinion that will follow this Order, the Court GRANTS the Motion to Consolidate the Hearings of the first and second Preliminary Injunctions. This Court further DENIES both Preliminary Injunctions, DENIES Consolidation of Hearing with Trial on the Merits, and DENIES Expediting this matter. This case shall be scheduled for the next pretrial conference date.

A preliminary injunction is "an extraordinary remedy," one "to be granted only sparingly." *In re*

Microsoft Litig., 333 F.3d 517, 524 (4th Cir. 2003). Additionally, the party seeking the preliminary injunction bears the burden of proving that each factor supports granting relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. [*2] 1991). In consideration of a Preliminary Injunction, the Court must weigh four factors: (1) the likelihood of irreparable harm to the plaintiff if its request for relief is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits of its claim; and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1977).

After hearing the arguments presented by all parties, this Court finds that Plaintiff is unlikely to succeed on the merits of the claims of unconstitutionality of the challenged provisions. Further, this Court has considered the irreparable harm element and finds that in balancing the harms of each party, the harm to the Defendants will be greater than the harm to the Plaintiff. Lastly, this Court finds that a grant of these injunctions would negatively impact the public. Because Plaintiff fails to demonstrate a likelihood of success on the merits, an irreparable harm greater than that of Defendants, and that public policy would be served by granting these injunctions, Plaintiff has failed to meet its burden. Accordingly, this Court DENIES both Motions for Preliminary Injunction.

A Memorandum supporting these findings will follow this Order.

It is SO ORDERED

Signed by Chief United States District Judge James R. Spencer on September 11, 2008.

[Doc. 76, filed October 6, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff,	)	Civil Action No. 08-1977.
v.	)	
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

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2 U.S.C. § 431(17)

Independent expenditure. - The term "independent expenditure" means an expenditure by a person

> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

11 C.F.R. § 100.16(a)

The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

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11 C.F.R. § 100.22

Expressly advocating means any communication that–

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

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11 C.F.R. § 100.57(a)

Treatment as contributions. A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

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11 C.F.R. § 114.15

Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) Permissible electioneering communications. Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) Safe harbor. An electioneering communication is

permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

(c) Rules of interpretation. If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by

the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) Information permissibly considered. In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate

for office or whether a communication describes a public policy issue.

(e) Examples of communications. A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this section is available on the Commission's Web site, http://www.fec.gov.

(f) Reporting requirement. Corporations and labor organizations that make electioneering communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

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In the Supreme Court of the United States

THE REAL TRUTH ABOUT OBAMA, INC., PETITIONER

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the district court abused its discretion by declining to preliminarily enjoin the Federal Election Commission (FEC) and the Department of Justice from enforcing, both facially and as applied:

(a) an FEC regulation defining the term "expressly advocating," 11 C.F.R. 100.22(b);

(b) an FEC regulation regarding contributions received in response to solicitations, 11 C.F.R. 100.57;

(c) the FEC's approach to determining political committee status, as explained in *Federal Register* notices; and

(d) an FEC regulation regarding corporation-funded "electioneering communications," 11 C.F.R. 114.15.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 575 F.3d 342. The opinion of the district court (Pet. App. 19a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on August 5, 2009. A petition for rehearing was denied on October 6, 2009 (Pet. App. 56a). The petition for a writ of certiorari was filed on December 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought a preliminary injunction against (1) enforcement of three regulations promulgated by the Federal Election Commission (FEC or Commission),

and (2) the Commission's approach to determining whether particular entities are "political committees" for purposes of federal campaign-finance laws. The district court denied preliminary injunctive relief, Pet. App. 19a-53a, and the court of appeals affirmed, *id.* at 1a-17a.

1. The FEC is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8); see 2 U.S.C. 438(a)(8) and (d); to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. 437g. The Department of Justice prosecutes criminal violations of the Act. See 2 U.S.C. 437g(d).

2. a. FECA defines the term "contribution" to include anything of value given "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). Similarly, FECA defines the term "expenditure" to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). Although FECA generally prohibits corporations from making any such expenditures, 2 U.S.C. 441b(a), this Court recently held that provision's restrictions on corporate independent expenditures to be unconstitutional, see *Citizens United* v. *FEC*, 130 S. Ct. 876, 913 (2010), and even before that decision the expenditure ban did not apply to corporations that qualified as "political committees," see 11 C.F.R. 114.12(a).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court reviewed FECA's original prohibition on expenditures of more than $1000 "relative to" a federal candidate. *Id.* at 39-44. To avoid vagueness concerns, the Court construed that provision "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Shortly thereafter, Congress codified that holding by defining the term "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 479 (2 U.S.C. 431(17)).

The Commission subsequently promulgated a regulatory definition of the statutory term "expressly advocating." 11 C.F.R. 100.22. Subsection (a) of the definition encompasses communications that use phrases or campaign slogans such as "'re-elect your Congressman'" or "'support the Democratic nominee,' * * * which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. 100.22(a). Subsection (b) includes any communication that has an "electoral portion" that is "unmistakable [and] unambiguous" and cannot reasonably be construed to convey any meaning except to encourage a candidate's election or defeat. 11 C.F.R. 100.22(b).

Citing this Court's limiting construction of FECA's "expenditure" definition in *Buckley*, a number of lower courts held that Congress's constitutional authority to regulate campaign expenditures is limited to communications containing "magic words" of advocacy, such as "vote for" or "vote against." See, *e.g.*, *FEC* v. *Christian Action Network, Inc.*, 110 F.3d 1049, 1052-1055 (4th Cir.

1997). In *McConnell* v. *FEC*, 540 U.S. 93 (2003), however, this Court rejected the argument that the government's regulatory power is constitutionally limited to "magic words" of advocacy. *Id.* at 190-193. The Court explained that *Buckley*'s "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-192.

b. Under FECA, any "committee, club, association, or other group of persons" that receives over $1000 in contributions or makes over $1000 in expenditures in a calendar year is a "political committee." 2 U.S.C. 431(4)(A). A political committee must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements, with exceptions for most transactions under $200. See 2 U.S.C. 433, 434(a)-(b). No person may contribute more than $5000 per calendar year to any one political committee, other than a political party committee. 2 U.S.C. 441a(a)(1)(C).

In *Buckley*, this Court concluded that if political-committee status were defined "only in terms of amount of annual 'contributions' and 'expenditures,'" FECA's political-committee provisions might be applied overbroadly to reach "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political-committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Ibid.* Under that limiting construction, an entity that is not controlled by a candidate need not register as a political committee—and may therefore receive contributions of more than $5000 per year from each donor—unless its "major purpose" is the nomination or election of federal candidates.

In February 2007, the Commission published in the *Federal Register* an Explanation & Justification explaining the Commission's decision not to promulgate a revised definition of "political committee" that would encompass all "527" groups, *i.e.*, "political organizations" holding tax-exempt status under Section 527 of the Internal Revenue Code. *Political Committee Status*, 72 Fed. Reg. 5595; 26 U.S.C. 527(a) and (e)(1). The notice stated that the Commission, rather than promulgating a new regulation, would continue its longstanding practice of determining each organization's major purpose on a case-by-case basis. See 72 Fed. Reg. at 5596-5597. The notice then discussed a number of prior administrative and civil matters in which the Commission or a court had analyzed a group's major purpose, and it explained that those descriptions cumulatively "provid[ed] considerable guidance to all organizations" regarding the criteria that are used to apply the "major purpose" test. See *id.* at 5595, 5605-5606.

c. FECA does not provide specific criteria for determining whether a particular donation is made "for the purpose of influencing any election" and therefore constitutes a "contribution." 2 U.S.C. 431(8)(A)(i). By regulation, the Commission has defined the term "contribution" to include a "deposit of money * * * made by any person in response to any communication * * * if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. 100.57(a).

On September 18, 2009, the D.C. Circuit declared that regulation unlawful. *EMILY's List* v. *FEC*, 581 F.3d 1, 17-18 (D.C. Cir. 2009). The Commission has accordingly announced that the regulation "will not be en-

forced." *FEC Statement on the D.C. Circuit Court of Appeals Decision in* EMILY's List v. Federal Election Commission (Jan. 12, 2010), http://www.fec.gov/press/press2010/20100112EmilyList.shtml. On March 11, 2010, the Commission approved the repeal of Section 100.57 in its entirety, effective April 18, 2010 (the required 30 days after publication in the *Federal Register*). See *Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010).

d. The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, defines the term "electioneering communication," in the context of a presidential election, as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before the general election or thirty days before a primary election or convention. 2 U.S.C. 434(f)(3)(A)(i). BCRA prohibited corporations (other than incorporated political committees) and unions from making any "direct or indirect payment * * * for any applicable electioneering communication." 2 U.S.C. 441b(b)(2).

This Court initially upheld the constitutionality of this financing restriction for electioneering communications "to the extent that the issue ads * * * are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206; see *id.* at 189-194, 203-208; *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 465 (2007) (*WRTL*). The Chief Justice's controlling opinion in *WRTL* explained that a communication is "the functional equivalent of express advocacy" if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551

U.S. at 469-470. The Commission then codified that standard in a regulation. 11 C.F.R. 114.15. Subsequently, however, this Court held the financing restriction unconstitutional in its entirety. See *Citizens United*, 130 S. Ct. at 913. The Commission has accordingly announced that it will no longer enforce either the regulation or the statutory restriction on the financing of electioneering communications. *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC (Feb. 5, 2010), http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

3. Petitioner The Real Truth About Obama, Inc., is a nonprofit Virginia corporation. Petitioner incorporated on July 24, 2008, and it filed its complaint in this case six days later. Pet. App. 2a.

In its complaint, petitioner alleged that it had developed two radio advertisements, entitled *Change* and *Survivors*. Pet. App. 20a-22a. *Change* purported to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." *Id.* at 20a-21a. That voice stated, in a first-person declaration, that then-Senator Obama wished to provide federal funds for every abortion performed in the United States, legalize partial-birth abortion, and "[g]ive Planned Parenthood lots more money." *Id.* at 20a. Near the end of the advertisement, a woman's voice asked: "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" *Id.* at 21a. *Survivors* stated that Senator Obama "has been lying" about his voting history regarding abortion, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." *Id.* at 21a-22a.

Petitioner alleged that it intended to broadcast these advertisements during the 60-day period preceding the 2008 general election. See Pet. App. 21a. Petitioner further alleged that it had developed a fundraising solicitation. *Id.* at 22a-24a. Petitioner did not allege that it had raised, attempted to raise, or spent any funds toward the production or distribution of the ads, or for any other purpose.

4. Petitioner moved for a preliminary injunction to preclude implementation of the FEC regulations described above and the approach used by the Commission to determine whether particular entities are "political committees." Petitioner contended that those aspects of the FEC's regulatory regime are unconstitutional, both on their face and as applied to *Change* and to petitioner's planned solicitation. Petitioner later filed a second motion for a preliminary injunction, which sought to enjoin the Commission's enforcement of its regulations against *Survivors*.

In an order dated September 11, 2008, the district court denied the motions for preliminary injunctions. Pet. App. 54a-55a. On September 24, 2008, the district court issued a memorandum opinion holding that petitioner did not satisfy any of the requirements for preliminary injunctive relief. *Id.* at 19a-53a. Petitioner appealed the denial of its preliminary injunction motions and sought an injunction pending appeal, which both the district court and the court of appeals denied. Civ. No. 3:08-483 Docket entry No. 81 (E.D. Va. Sept. 30, 2008); 08-1977 Docket entry No. 35 (4th Cir. Oct. 1, 2008).

5. The court of appeals affirmed the denial of petitioner's preliminary-injunction motions. Pet. App. 1a-17a.

The court of appeals held that the case was governed by the test set forth in *Winter* v. *NRDC*, 129 S. Ct. 365 (2008), which requires a plaintiff seeking a preliminary injunction to "establish '[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" Pet. App. 4a (brackets in original) (quoting *Winter*, 129 S. Ct. at 374). The court held that *Winter* had effectively overruled its earlier precedent, *Blackwelder Furniture Co. of Statesville* v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), under which the court had applied a "balance-of-hardship test" to preliminary-injunction motions. Pet. App. 4a-7a. Applying the *Winter* test, the court of appeals held that the district court had not abused its discretion in denying petitioners' motions.

The court of appeals first held that petitioner had not shown a likelihood of success on the merits of any of its claims. The court concluded that 11 C.F.R. 100.22(b) is "facially consistent with," and 11 C.F.R. 114.15 "mirrors," the test (*i.e.*, whether an advertisement "'is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,'" *WRTL*, 551 U.S. at 470 (opinion of Roberts, C.J.)) set forth in the controlling opinion in *WRTL*. Pet. App. 11a, 13a. Regarding 11 C.F.R. 100.57, the court noted that petitioner was unlikely to prevail on its claim that the language was unconstitutionally vague because the Fourth Circuit had "expressly sanctioned" the "support or oppose" standard in a prior case. Pet. App. 12a-13a (citing *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274, 301 (4th Cir. 2008)). The court also held that petitioner had failed to demonstrate a likelihood of suc-

cess on the merits as to the Commission's case-by-case approach to determining political-committee status, because of "the similarity [between] the [Commission's] approach * * * and the positions taken by the courts," including this Court, in applying the major-purpose test. *Id.* at 14a-15a. The court made clear that its likelihood-of-success analysis did not definitively resolve the merits of petitioner's constitutional challenges, which remain pending in the district court. *Id.* at 10a.

The court of appeals then considered the other preliminary-injunction factors. The court noted the district court's finding that petitioner faced no irreparable injury from the enforcement of the regulations because none of the challenged provisions imposed any limits on petitioner's spending and petitioner thus "was free to disseminate its message and make expenditures as it wished." Pet. App. 16a; see *id.* at 51a. The court of appeals did not decide "whether the district court was correct in this regard." *Id.* at 16a. Instead, the court held that the district court had reasonably concluded that the public-interest factor of the analysis favored continued enforcement of the regulations while this litigation is pending and outweighed any harm that petitioner might anticipate during that period. *Id.* at 16a-17a.

DISCUSSION

The Fourth Circuit correctly stated and applied the preliminary-injunction standards established by this Court. As a result of intervening decisions of this Court and the D.C. Circuit, however, the FEC has since determined that it will no longer enforce two of the regulatory provisions at issue in this case. With respect to those regulations, the Court should grant the petition, vacate the judgment below, and remand with instructions to

dismiss petitioner's claims as moot. In all other respects, the petition should be denied.

1. The Fourth Circuit correctly stated and applied *Winter*'s preliminary injunction standard. See Pet. App. 4a, 5a-7a, 10a, 15a-16a. Focusing on a snippet of the court of appeals' discussion, in which the court characterized the preliminary-injunction standard as "stringent" and the movant's burden as "heavy," *id.* at 10a, petitioner argues (Pet. 8-10) that the court of appeals erroneously "substituted" a "*heightened* version" of this standard. That argument lacks merit. The court below set forth the *Winter* test verbatim (Pet. App. 4a; see *id.* at 7a, 15a-16a) and faithfully applied it to the facts of this case. This Court has long described the preliminary-injunction standard as "stringent." *E.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). And the court of appeals characterized the movant's burden as a "heavy" one in explaining *Winter*'s holding that a mere possibility of success is not enough, see Pet. App. 10a (citing *Winter*, 129 S. Ct. at 375-376), and that more permissive standards—including the court of appeals' own former standard—conflict with *Winter*, *id.* at 5a-7a.[1]

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[1] Petitioner also asserts (Pet. 11-14) that this Court's review is warranted to decide whether "speech-protective standards" should replace the ordinary preliminary-injunction factors in First Amendment cases. A similar contention is raised in the petition for a writ of certiorari in *Doe* v. *Reed*, No. 09-559 (to be argued Apr. 28, 2010), which also involves review of a preliminary injunction in a First Amendment case. See Pet. at i, 29-31, *Doe*, *supra* (No. 09-559). There is no need to hold the petition in this case pending the disposition of *Doe*, however. The petitioners in that case have not addressed the issue any further in their merits brief, see Pet. Br. at 54, *Doe*, *supra* (No. 09-559) (stating that "further development of this argument is precluded by space limitations"),

There is also no merit to petitioner's contention (Pet. 10-11) that the court of appeals' references to petitioner's burden conflict with *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Petitioner suggests that, because it has asserted First Amendment claims as to which the government bears a heightened burden of justifying the challenged regulations, petitioner cannot be required to demonstrate that the criteria for a preliminary injunction have been satisfied. The decision in *O Centro*, however, did not alter the settled principle that a plaintiff who seeks a preliminary injunction must show that it is likely to suffer irreparable injury, that the balance of equities tips in its favor, and that an injunction is in the public interest. That principle applies regardless of the nature and source of the plaintiff's substantive claims. See, *e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (even when the plaintiff's claim on the merits triggers strict scrutiny, the court "considers whether the plaintiff has shown irreparable injury" in considering preliminary injunctive relief); see generally *Winter*, 129 S. Ct. at 374. In any event, petitioner is incorrect in asserting that all of its claims trigger strict scrutiny. See, *e.g.*, Pet. App. 12a, 13a, 43a, 48a (discussing petitioner's vagueness challenges); *id.* at 46a (discussing petitioner's challenge to the FEC's statutory authority).[2]

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making it unlikely that the holding in *Doe* will meaningfully affect this case.

[2] There is no need for plenary review simply to reaffirm the importance of preliminary injunctions in time-sensitive election cases, which petitioner emphasizes at length (Pet. 11-12, 14, 34). The courts below recognized the time-sensitivity of this case: petitioner was denied preliminary relief in the district court and court of appeals four times in the 64-day period between petitioner's filing of its complaint on July 30,

2. The court of appeals correctly held that the district court did not abuse its discretion in declining to preliminarily enjoin the enforcement of 11 C.F.R. 100.22(b) or the FEC's approach to determining political-committee status. Further review is not warranted.

a. As an initial matter, the current posture of the case weighs heavily against this Court's review. The court of appeals made clear that it was not ruling definitively on the merits of petitioner's claims, but rather holding only that petitioner had not shown a sufficient likelihood of success to be eligible for preliminary injunctive relief. Pet. App. 10a. In addition, the candidate against whom petitioner sought to advertise—then-Senator Obama—is not currently on the ballot anywhere. Although petitioner may well be able to show that its claims remain justiciable if petitioner plans to run the same or similar advertisements in future elections, see *WRTL*, 551 U.S. at 461-464; *id.* at 504 n.1 (Souter, J., dissenting), petitioner appears to have no present need for the extraordinary remedy of a preliminary injunction. Proceedings in the district court are stayed and will be free to resume once the court of appeals' mandate issues.

b. The court of appeals correctly concluded that petitioner was not likely to prevail in its challenge to 11 C.F.R. 100.22(b). Petitioner contends that it is at risk of being deemed a political committee by virtue of spending at least $1000 on communications that "expressly advocat[ed]," within the meaning of Section 100.22(b), against then-Senator Obama, a federal candidate. See

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2008, and the Fourth Circuit's denial of an injunction pending appeal on October 1, 2008. See p. 8, *supra*.

2 U.S.C. 431(4)(A) and (17). Section 100.22(b) covers any communication that

> [w]hen taken as a whole * * * could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Petitioner contends that the First Amendment does not permit communications meeting that definition to be regulated, and that petitioner was therefore likely to succeed on the merits in its challenge to Section 100.22(b). Petitioner asserts that the regulation is invalid because it (a) allegedly encompasses communications that are not "unambiguously campaign related" (Pet. 30-33), and (b) is not limited to electoral advocacy that contains "magic words" (Pet. 14-18). Both contentions lack merit.

i. As the court of appeals suggested (Pet. App. 12a), Section 100.22(b) comports with petitioner's proffered "unambiguously campaign related" test. On its face, the regulation requires that "[t]he electoral portion of the communication [be] unmistakable, unambiguous, and suggestive of only one meaning," *i.e.*, "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. 100.22(b). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign-related. Thus, even if the Constitution prohibits regulation of

communications that are not unambiguously campaign-related, Section 100.22(b) would not extend beyond that limit.

The correctness of the court of appeals' conclusion is confirmed by the lead opinion in *WRTL*. That opinion reiterated *McConnell*'s holding that Congress may regulate the funding of certain communications that are "the functional equivalent of express advocacy," *i.e.*, that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-470. Petitioner acknowledges (Pet. 32-33) that the First Amendment permits regulation of communications that meet the standard set out in *WRTL* (which petitioner calls the "appeal-to-vote test"). See *WRTL*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (rejecting vagueness concern). But the *WRTL* standard is nearly identical to the test in Section 100.22(b): Each inquires whether a particular communication can reasonably be interpreted as something other than candidate advocacy. Pet. App. 11a-12a.[3] To the extent the standards differ, Section 100.22(b) is narrower than the *WRTL* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *WRTL* looks to the "mention" of an elec-

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[3] Both tests avoid vagueness by refusing to consider the subjective intent of the speaker. Compare *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,295 (1995) (explaining that "the subjective intent of the speaker is not a relevant consideration"), with *WRTL*, 551 U.S. at 472 (opinion of Roberts, C.J.) ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant.").

tion and similar "indicia of express advocacy." See *WRTL*, 551 U.S. at 470.[4]

This Court's recent decision in *Citizens United* does not change the analysis. Although the Court held that corporations cannot be prohibited from *financing* express advocacy or its functional equivalent, 130 S. Ct. at 913, it did not redefine the types of election-related communications that may be subject to other forms of regulation. To the contrary, the Court confirmed that even communications that are *not* "the functional equivalent of express advocacy" under the *WRTL* test—and are not unambiguously campaign-related—can constitutionally be subject to other forms of regulation, such as disclosure requirements. *Id.* at 915.

ii. Petitioner also argues (Pet. 15-18) that the regulation of express advocacy is constitutionally limited to

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[4] Petitioner asserts that the lead opinion in *WRTL* "specifically acknowledged that the [*WRTL*] test is impermissibly vague" as applied to any speech other than electioneering communications. Pet. 17 (citing *WRTL*, 551 U.S. at 474 n.7). The lead opinion in *WRTL* says no such thing, and indeed dedicates the entire cited footnote to *rebutting* the argument that the only sufficiently clear constitutional standard would be a magic words test. The lead opinion did not hold that its own test would be impermissibly vague if not tethered to BCRA's statutory criteria for electioneering communications. And although, as petitioner asserts (Pet. 33), language in *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008), might be read to suggest that the statutory definition of an electioneering communication also has constitutional significance, see *id.* at 297-299, the court of appeals here saw no conflict with its own precedent. See Pet. App. 12a (distinguishing *Leake*). Even if the court of appeals' discussion of petitioner's likelihood of success could be said to conflict with the holding of *Leake*, an intracircuit conflict would not warrant this Court's review. Petitioner's other attempts to establish a conflict with Fourth Circuit decisions (Pet. 15, 23, 24) similarly would not justify review.

"magic words" of advocacy.[5] But as the foregoing discussion demonstrates, the regulation of election-related communication is not so confined. Six Members of the Court in *WRTL* rejected the proposition, raised in Justice Scalia's separate opinion, that the only permissible constitutional standard is a magic-words test. 551 U.S. at 474 n.7 (opinion of Roberts, C.J.); *id.* at 513-520 (Souter, J., dissenting). Petitioner is therefore wrong to attach controlling significance to the fact that Section 100.22 defines the statutory term "expressly advocating," rather than "electioneering communication" or "functional equivalent of express advocacy." See Pet. 17, 33. That fact lacks significance in the First Amendment analysis: what matters, as the court of appeals recognized, is that the functional equivalent of express advocacy may constitutionally be regulated.

In *McConnell*, this Court squarely held that Congress's authority to regulate election-related communications extends beyond communications that contain "magic words." See *McConnell*, 540 U.S. at 190-194.[6]

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[5] Petitioner asserts as well (Pet. 18) that "Section 100.22(b) is also beyond statutory authority." The thrust of petitioner's argument in the court of appeals, however, was that Section 100.22(b) is an impermissible exercise of the Commission's statutory authority because it transgresses *constitutional* limits on the regulation of campaign-related speech. See Pet. C.A. Br. 20-29. The Fourth Circuit so understood petitioner's argument: the court explained that petitioner had failed to show a likelihood of success on the merits of its challenge to Section 100.22(b) because the court "cannot conclude that [the regulation] is likely unconstitutional." Pet. App. 11a; see *id.* at 10a-12a.

[6] Congress expressly provided in BCRA that amending FECA to reach electioneering communications had no effect on the Commission's regulatory definition of express advocacy. 2 U.S.C. 434(f)(3)(A)(ii)

As Justice Thomas noted in dissent, that holding "overturned" the court of appeals decisions that had read *Buckley* as limiting regulation to magic words. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., concurring in the judgment in part and dissenting in part). Those decisions included *Christian Action Network, supra*; *Virginia Society for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (relying on *Christian Action Network*); and the other pre-*McConnell* cases that petitioner cites (Pet. 15-16 & nn.8 & 10) for the purported disagreement among the courts of appeals on this issue. As Justice Thomas further noted, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987)—the case from which the Commission derived the test codified at Section 100.22(b), see *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292-35,295 (1995).

The three post-*McConnell* court of appeals cases (none of which involved preliminary injunctions or FECA) on which petitioner relies (Pet. 16 & n.9) do not support the proposition that express advocacy "is a magic-words test." In one of those decisions, the court of appeals recognized in dicta that the court in *Furgatch* had construed express advocacy under FECA in a manner identical to Section 100.22(b). See *ACLU* v. *Heller*, 378 F.3d 979, 985 (9th Cir. 2004). In the other two cases, the courts of appeals applied a magic-words interpretation of express advocacy to cure vagueness problems in a state statute, while recognizing that such an interpre-

("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.").

tation "is not constitutionally mandated." *Center for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665-666 & n.7 (5th Cir. 2006), cert. denied, 549 U.S. 1112 (2007); accord *Anderson* v. *Spear*, 356 F.3d 651, 664-665 (6th Cir.), cert. denied, 543 U.S. 956 (2004).

c. The court of appeals also correctly held that petitioner was not likely to prevail in its challenge to the Commission's explanation of how it applies the major-purpose test for political-committee status.

i. Under the Administrative Procedure Act (APA), courts may hear challenges only to "final agency action." 5 U.S.C. 704. Final agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). But the primary purpose of the Commission's notice was to explain why a broad regulation was *not* created; the notice does not purport either to establish a binding norm or to decide any entity's legal status. Rather, the notice simply provides guidance about political-committee status and the major-purpose test, based on specific administrative and civil enforcement actions. 72 Fed. Reg. at 5604; see p. 5, *supra*. Petitioner thus has not identified any final agency action subject to APA review.[7]

ii. Even if the Commission's notice regarding political-committee status were subject to an APA challenge, the court of appeals did not err in concluding that such a challenge is unlikely to succeed.

Under the major-purpose test, an organization will not be regulated as a political committee unless its "major purpose * * * is the nomination or election of a can-

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[7] Although the final-agency-action point was raised in the courts below, see, *e.g.*, Gov't C.A. Br. 37-39, neither court addressed the point.

didate." *Buckley*, 424 U.S. at 79. Petitioner contends that this test can be satisfied only if an entity spends more than half of its funds on magic-words express advocacy (see Pet. 24-28) or if its "organic documents" reveal an "express intention to operate as a political committee" (Pet. 27).[8]

In support of this argument, petitioner cites *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), and *Colorado Right to Life Committee, Inc.* v. *Coffman*, 498 F.3d 1137 (10th Cir. 2007). Pet. 24-25. But the major-purpose test was not at issue in *MCFL*, where it was "undisputed" that the plaintiff's "central organizational purpose" was not candidate-related. 479 U.S. at 252 n.6. In suggesting that MCFL's "independent spending" could theoretically "become so extensive that the organization's major purpose may be regarded as campaign activity," *id.* at 262, this Court neither stated nor implied that express-advocacy communications are the only kind of "campaign activity" that can satisfy the major-purpose test. Nor did the Court establish a rigid rule that an organization must devote more than 50% of its funds to campaign-related spending in order for such spending to be deemed "extensive."

The Tenth Circuit in *Coffman* invalidated a state statute that did not use the major-purpose test at all, but rather based political-committee status only on annual expenditures. See 498 F.3d at 1153-1154. To the

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[8] Petitioner states (Pet. 27) that such an "express intention" would be shown if an organization's internal documents designated the organization as a "separate segregated fund." But that purported illustration is meaningless, for a "separate segregated fund" has already, by definition, designated itself as a political committee. See 2 U.S.C. 431(4)(B). The major-purpose test is therefore irrelevant to such entities.

extent that the court discussed the major-purpose test, it emphasized that this Court in *MCFL* had "suggested two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending." *Id.* at 1152; see *Shays* v. *FEC*, 511 F. Supp. 2d 19, 26-31 (D.D.C. 2007) (upholding Commission's approach to major-purpose test); *FEC* v. *Malenick*, 310 F. Supp. 2d 230, 234-237 (D.D.C. 2004) (basing major-purpose determination on, *inter alia*, organization's statements in brochures, fax alerts sent to potential and actual contributors, and spending to influence federal elections); *FEC* v. *GOPAC, Inc.*, 917 F. Supp. 851, 859, 864-866 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."). The court of appeals in this case was thus correct in stating that the case-by-case analysis described in the Commission's notice was properly "adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose" of an organization, and that the agency's approach is consistent with "the positions taken by the courts." Pet. App. 14a-15a.

d. Even if the court of appeals' conclusions about petitioner's likelihood of success implicated a circuit conflict or were otherwise suitable for this Court's review, reversing those conclusions ultimately would make no difference in this preliminary-injunction appeal. The district court correctly held that petitioner had failed to demonstrate a likelihood of irreparable harm because all of petitioner's planned activities would have been legal even if petitioner had actually been deemed a political

committee under the FEC's enforcement approach. See Pet. App. 51a. The Fourth Circuit noted the district court's holding on this issue but did not rule directly on it. Rather, the court of appeals explained that any harm created by petitioner's doubt about the legality of its intended activities was outweighed by the public interest in enforcement of the restrictions at issue. *Id.* at 16a. On either the district court's reasoning or the court of appeals', petitioner was not entitled to a preliminary injunction.[9]

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376. Petitioner alleges that it will suffer irreparable harm in the form of an unspecified "loss of First Amendment rights to engage in core political speech in the form of highly-protected issue advocacy at the most opportune time." Pet. 34; see Pet. 13, 33. But even if the FEC's approach to political-committee status had caused petitioner to be designated as a political committee, that designation would not have prohibited petitioner from making and paying for any "political speech" it desired. As a political committee, petitioner could have engaged in *unlimited* independent campaign advocacy, including any communications constituting express-advocacy independent expenditures under 11 C.F.R. 100.22(b). See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985) (striking down spending limits on independent expendi-

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[9] Petitioner had the burden of showing both a likelihood of irreparable injury and that the public interest favors an injunction. See p. 12, *supra*.

tures by political committees).[10] Thus, as the district court held, petitioner would remain "free to disseminate [its] message and make any expenditures [it] wish[ed]." Pet. App. 51a.[11]

As the district court explained (Pet. App. 52a), entry of a preliminary injunction during the period immediately before the 2008 general election would have impeded the Commission's performance of its governmental functions and disserved the public interest. The regulations governing political committees ensure that such entities abide by contribution limits and disclose their receipts and disbursements to the public. Those limits and disclosure requirements serve compelling interests in preventing actual and apparent corruption, informing the public, and facilitating the Commission's enforcement of the law.

Enjoining application of the Commission's approach to determining political-committee status could have confused political actors, facilitated excessive contribu-

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[10] Indeed, under the legal regime in effect at the time of the rulings below, petitioner's designation as a political committee would have *increased* its ability to engage in independent electoral advocacy, since political committees are exempt from FECA's generally applicable restrictions on independent electioneering by corporations. See 11 C.F.R. 114.12(a). Because the Court in *Citizens United* struck down those statutory restrictions on independent corporate electioneering, see 130 S. Ct. at 913, that exemption for political committees no longer confers any practical advantage. As before, however, designation as a political committee does not preclude an organization from engaging in any form of electoral advocacy.

[11] Petitioner cannot demonstrate any irreparable harm arising from the $5000 limit on contributions to political committees, see 2 U.S.C. 441a(a)(1)(C), since petitioner did not allege (much less demonstrate) that its fundraising would have been significantly impaired by enforcement of that limit.

tions, deprived the public of important information, and undermined the public's confidence in the federal campaign finance system. "Court orders affecting elections * * * can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (vacating pre-election preliminary injunction and noting that "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases"). As the court of appeals recognized (Pet. App. 16a-17a), the district court did not abuse its discretion in recognizing and according weight to these harms to the Commission and the public.

3. Petitioner's remaining challenges, to 11 C.F.R. 100.57 and 114.15, are moot. In light of the decisions in *Citizens United* and *EMILY's List*, the Commission has announced that it will no longer enforce those regulations. See pp. 6, 7, *supra*. Because petitioner cannot show that it currently faces "any concrete actual or threatened harm" from Sections 100.57 and 114.15, its challenge to those provisions is no longer justiciable. *Alvarez* v. *Smith*, 130 S. Ct. 576, 581 (2009).[12]

Because these claims were mooted by the outcome of separate litigation to which petitioner was not a party, it would be appropriate for this Court to vacate the judgment below to the extent it addressed the merits of petitioner's challenges to Sections 100.57 or 114.15. See *Alvarez*, 130 S. Ct. at 582-583. Accordingly, with respect

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[12] Indeed, petitioner's challenge to Section 100.57 was never justiciable, since petitioner's proposed solicitation (Pet. App. 22a-24a) did not "indicate[] that any portion of the funds received [in response] will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. 100.57(a); see Gov't C.A. Br. 31.

to those claims, the Court should grant the petition, vacate the judgment below, and remand with instructions to dismiss those claims as moot.

CONCLUSION

With respect to petitioner's challenges to 11 C.F.R. 100.57 and 114.15, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to dismiss those claims as moot. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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The Real Truth About Obama, Inc., *Petitioner*

v.

Federal Election Commission and
United States Department of Justice

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Corporate Disclosure

The Real Truth About Obama, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock.

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Reasons to Grant the Petition

Respondents' (collectively "FEC") Opposition raises broader issues than those posed by 11 C.F.R. 100.22(b) and FEC's PAC-status policy. FEC claims *broad* authority from *McConnell v. FEC*, 540 U.S. 93 (2003)—and from its authority "to 'formulate policy' with respect to FECA" (Opp'n 2 (citation omitted))—to regulate speech and speakers as it chooses without congressional action and despite court decisions. FEC's claim defies *Buckley v. Valeo*, 424 U.S. 1 (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *McConnell* itself, which all establish that FEC has *narrow* authority. FEC's broad claim of authority raises additional issues that this Court should decide in reconciling these case lines.[1]

I. This Court Should Review Whether *McConnell* Granted FEC Authority to Define Statutory "Express Advocacy" as It Chooses.

RTAO showed that *Buckley* and *MCFL* established a magic-words "express advocacy" test; that all mem-

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[1] FEC will not enforce 11 C.F.R. 100.57 and 114.15. (Opp'n 5-7.) The former is unconstitutional and beyond statutory authority. *EMILY's List v. FEC*, 581 F.3d 1, 17-18, 21-22 (D.C. Cir. 2009). The latter was "precisely what *WRTL*[*-II*] sought to avoid," *Citizens*, 130 S. Ct. at 895-96, and lacks function after *Citizens* held corporate speech prohibitions unconstitutional. Claims regarding these are moot and should be handled as FEC suggests. (Opp'n 25.) But the district court's clear error of law as to them was abuse of discretion and RTAO should have received a preliminary injunction.

bers of this Court in *WRTL-II* and *McConnell* recognized that express advocacy requires "magic words"; that lower courts before and after *McConnell* recognized the express-advocacy test as a magic-words test; and that the only statutory authority is for a magic-words test. (Pet. 15-18.) To this must now be added the dissent's recognition (twice) of the same in *Citizens*: "If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley* . . . ," 130 S. Ct. at 935 n.8 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part); *id.* at 956 (equating express advocacy with "magic words"). But despite this, FEC argues that it is not bound by these cases because *McConnell* gave FEC broad authority to regulate *more* than express advocacy. (Opp'n 17.)

This is an important issue for this Court to decide. Did *McConnell* insist that the "express advocacy" test requires "magic words," as RTAO argues, or did *McConnell* give FEC broad authority to survey America's political speech and prohibit, by regulation, the speech it does not like, as FEC says it did here in adopting 11 C.F.R. 100.22(b)?

Furthermore, FEC justifies 100.22(b) as being like *WRTL-II*'s appeal-to-vote test (Opp'n 15), or more particularly, like FEC's *interpretation* of that test at FEC's unconstitutional rule at 11 C.F.R. 114.15. (Opp'n 16). FEC describes *WRTL-II*'s test as "look[ing] to the 'mention' of an election and similar 'indicia of express advocacy.'" (Opp'n 16.) However, that was *not* part of *WRTL-II*'s appeal-to-vote test. FEC's interpretation of the test (importing elements of a particular *application*

of the test into the test) was "precisely what *WRTL*[*-II*] sought to avoid," *Citizens*, 130 S. Ct. at 896. By its new regulation, FEC converted the "objective 'appeal to vote' test" into a subjective "two-part, 11-factor balancing test," *id.* at 895, that was "onerous" and the "function[al] . . . equivalent of prior restraint by giving the FEC power analogous to licensing laws . . . ." *Id.* at 895-86.

Thus, this is an important issue for this Court to decide. Does the unconstitutional "two-part, 11-factor balancing test" in section 114.15 live on in FEC's alternate definition of "express advocacy," 100.22(b), or is it unconstitutional as *Citizens* explained? Furthermore, is the appeal-to-vote test a free-floating test that FEC may import into the express-advocacy context, or is it rather a gloss only on the electioneering-communication prohibition imposed by *WRTL-II*, 551 U.S. 449, as the Fourth Circuit held? *North Carolina Right to Life v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008). (Pet. 17).

FEC further claims that 100.22(b) is "identical to" the express-advocacy test stated in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (Opp'n 18), but it is not. *Furgatch* said "speech may only be termed 'advocacy' if it presents a clear plea for action, and . . . it must be clear what action is advocated[, i.e.,] . . . a vote for or against a candidate . . . "[2] Section 100.22(b) contains no clear-plea-for-action requirement that must be to

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[2] *Furgatch* applied this to an anti-Nixon ad that proclaimed "DON'T LET HIM DO IT!" where the only way to "[not] let him do it" was to vote against him. The Ninth Circuit decided that there was a "clear plea for action" and the action solicited was "a vote for or against a candidate" so the communication at issue fit the test.

"vote." And the *Furgatch* test was narrowed by the Ninth Circuit, which held that "*Furgatch* . . . presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original).

Thus, this is an important issue for the Court to decide: Does the *Furgatch* test live on—after *McConnell*, *WRTL-II*, and *Citizens* held that express advocacy required magic words—to justify 100.22(b), and, if it does, does it faithfully impose the test in *Furgatch*, as explained in *Getman*?

This Court should accept this case to determine whether the express-advocacy test requires "magic words." It should accept the case to decide whether *McConnell* granted FEC authority to regulate speech as it chooses without congressional action—leaving regulation to FEC whim.[3] This Court should accept this case to eliminate chilling vagueness and provide protection for First Amendment activity. And this Court should accept this case to halt FEC's overreaching regarding the express-advocacy test, which is of a kind with its overreaching on the appeal-to-vote test. *See supra.*

II. This Court Should Review Whether FEC May Base PAC Status on the Sort of Factors Rejected in *Citizens*.

RTAO set out the bright-line, protective test for PAC status established in *Buckley*, 424 U.S. at 79, *MCFL*, 479 U.S. at 252 n.6, 262, and other federal court decisions, including the requirement that major

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[3] "[W]e don't put our First Amendment rights in the hands of FEC bureaucrats . . . ." Transcript of Oral Argument at 66, *Citizens*, 130 S. Ct. 876 (No. 08-205) (Roberts, C.J.).

purpose be determined based on "an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (emphasis added). (Pet. 22-28.) Essentially, a group's status is readily determined based on whether its *regulable* disbursements for "contributions" or "independent expenditures" (express advocacy) exceed fifty percent of its annual disbursements.[4]

FEC, however, argues that it may employ a vague, case-by-case analysis that does not define "major purpose" as involving only an examination of regulable activity as fifty-percent or more of annual activity. FEC wants PAC status to be determined on undefined factors *other* than regulable speech and on something *less* than 50 percent of disbursements.[5]

This raises the problems identified in *Citizens*, which was decided after the Fourth Circuit decision in the present case. *Citizens* rejected regulations where

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[4] Entities controlled by candidates or designated political committees in organic documents, e.g., as "separate segregated funds," would automatically be political committees.

[5] FEC based its PAC-status policy on regulations expanding the "contribution" (by 11 C.F.R. 100.57) and "expenditure" (by 11 C.F.R. 100.22(b)) that can trigger statutory "political status" under 2 U.S.C. 431(4) and on its ambiguous, case-by-case interpretation of "major purpose." *See* "Political Committee Status," 72 Fed. Reg. 5595 (2007). It used these expansive concepts to capture as PACs organizations that had not thought they were PACs, so had not complied with PAC regulations, and were thus subject to substantial penalties. *Id.* at 5604-05. Despite the demise of 100.57 and the unconstitutionality of 100.22(b), *supra*, FEC insists on defending its overly expansive enforcement policy as to "major purpose."

speech is chilled by an ambiguous, multi-factor test that is likely to lead to burdensome litigation and provides FEC unfettered discretion to determine (ex post facto) who may speak, all heightened by severe civil and criminal penalties. This approach provides no protection for speakers.

First, *Citizens* rejected approaches where "substantial time would be required to bring clarity to the application" of a regulation. 130 S. Ct. at 895. But FEC's case-by-case policy would require substantial time before it is clear what constitutes major purpose.

Second, *Citizens* rejects approaches not allowing for resolution within the "short timeframes in which speech can have influence" on elections, leaving speakers judicial relief "long after the opportunity to persuade primary voters has passed." *Id.* But FEC's policy lacks the bright lines for ready determination of status (instead relying on lengthy, expensive, intrusive investigations of all activities to determine status). And this present case demonstrates starkly the inability to obtain judicial relief in a timely fashion.

Third, *Citizens* requires recognition of "the primary importance of speech itself to the integrity of the election process" and accordingly rejects prolix and complex rules, subjective tests, balancing, and "'the open-ended rough-and-tumble of factors' . . . [that] 'invite[es] complex arguments in a trial court and a virtually inevitable appeal.'" *Id.* at 895-96 (citation omitted). But FEC's policy is based on a pair of rambling, vague explanations in the Federal Register that rely on numerous poorly-defined factors to determine major purpose—just what *Citizens* rejected.

Finally, *Citizens* particularly rejects any "regime that allows [FEC] to select what political speech is safe

for public consumption by applying ambiguous tests" that have "[g]overnment officials por[ing] over each word of a text to see if, in their judgment, it accords with the 11-factor rest. *Id.* at 896. That is precisely what FEC's policy does as to speakers, allowing FEC to do the more intrusive and burdensome activity of poring over every internal detail of a group's activities to determine whether it comports with an even more vague major-purpose "test." "This is an unprecedented governmental intervention into the realm of speech." *Id.*

Thus, this Court should accept this case to decide the important issue of whether RTAO's bright-line, speech-protective manner of determining PAC-status or FEC's vague multi-factor ex post facto test is more consistent with this Court's precedent. This issue is particularly important because *Citizens* permits more groups to engage in political speech. They should not be subjected to the chill of having vague, subjective standards allowing ex post facto findings of PAC status (with substantial penalties) after burdensome, intrusive investigations.

III. This Court Should Review Whether the PAC Option Removes Irreparable Harm and What Interests Justify PAC Burdens.

In First Amendment cases, the other preliminary injunction factors should essentially follow from the finding as to likely success on the merits. The court below rejected that approach. Three FEC arguments highlight why this case should be reviewed.

First, RTAO sought pre-enforcement judicial relief both to *avoid* onerous PAC burdens and to *avoid* being deemed a PAC ex post facto and thereby liable for substantial civil and criminal penalties for noncompli-

ance with PAC requirements. FEC blithely asserts that RTAO has no irreparable harm because it can do all the activities it seeks to do by simply *being* a political committee! (Opp'n 21-22.) *Citizens*, however, pronounced PAC burdens "onerous," *id.* at 897-98, as did *WRTL-II*, 551 U.S. at 477 n.9 (controlling opinion) ("PACs impose well-documented and onerous burdens"). And the enormous penalties to which an ex post facto finding of PAC status would subject RTAO, when it did not comply with PAC requirements because it believed it was not a PAC, are clearly irreparable harm. This is true especially if the PAC-status enforcement policy is likely unconstitutional. Thus, this Court should accept this case to determine whether the rejection of the PAC option in *WRTL-II*, 551 U.S. at 477 n.9, and *Citizens*, 130 S. Ct. at 897—because it does not alleviate constitutional problems with restricting speakers—controls preliminary injunctions or whether availability of the PAC option means there is no irreparable harm because a speaker can do the same speech through a PAC (as FEC argues).

Second, *Citizens* reaffirms that the only type of corruption justifying speech restrictions is quid pro quo. 130 S. Ct. at 909-11. FEC claims, however, that imposing PAC restrictions is justified by "compelling interests in preventing . . . corruption, informing the public, and facilitating the Commission's enforcement of the law." (Opp'n 23.) Thus, FEC is claiming broad authority to regulate speech, based not just on quid pro quo corruption, but on two interests that have not been previously identified as "compelling" and have only been used so far to justify *simple* disclosure requirements. *Buckley*, 424 U.S. at 66-68. If mere public desire to *know* about a group's activities and FEC

desire to *enforce* PAC requirements are sufficient to justify PAC burdens, then PAC status may be imposed on anyone. This Court should accept this case to decide whether interests other than preventing quid pro quo corruption justify imposing PAC status.

Third, FEC argues that it is more important for likely-unconstitutional restrictions to remain in place near elections—because of the potential for public confusion and lack of confidence in campaign finance regulations—than for constitutional rights to be protected. (Opp'n 23-24.) *WRTL-II*, 551 U.S. at 469, and *Citizens*, 130 S. Ct. at 895, however, recognized the propriety of constitutional challenges near elections, where unconstitutional laws would be challenged and enjoined. Thus, this Court should accept this case to decide whether retaining confidence in campaign-finance regulations or in the Constitution itself must control in public-interest balancing in the preliminary injunction context—and whether there is any cognizable public interest in maintaining likely-unconstitutional restrictions in place before an election.

IV. Protective First Amendment Preliminary-Injunction Standards Are Required.

RTAO argued that the appellate court applied a *heightened* preliminary-injunction standard and placed a *heavy* burden on *RTAO* instead of the government to justify the preliminary injunction. (Pet. 8-11.) The court below said that *because* ("for that reason") campaign-finance law is "a difficult and complicated area of law that is still developing" RTAO's burden would be "heavy." (Pet. 9.) The court also used the "clear showing" requirement to elevate the "likely" requirement (as to success and harm) to a *highly* likely requirement. (Pet. 9-10.) FEC justifies this heavy bur-

den by saying that the standard is always "'stringent.'" (Opp'n 11 (citation omitted).) This case should be accepted to decide whether the standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), should be applied to campaign-finance litigation or whether a heavier burden should be imposed on First Amendment challenges to campaign-finance rules in order to obtain preliminary relief.

RTAO also argued that the appellate court failed to require that the government bear the burden of justifying its speech regulation. (Pet. 10-11.) FEC does not address who should have the burden regarding likely success on the merits, but it argues that RTAO had the burden regarding all other preliminary-injunction requirements. (Opp'n 12.) This case should be accepted to decide who has the burden as to likely success and the other elements of the preliminary-injunction standard in cases involving campaign-finance speech restrictions. This is important since preliminary injunctions in First Amendment challenges to campaign-finance laws are essential to timely protection of citizens' political-speech rights.

Finally, FEC argues that "petitioner appears to have no present need for [a preliminary injunction]," so review should be denied. (Opp'n 13.) However, FEC's arguments illustrate exactly why an appeal of a preliminary-injunction denial should be accepted for review. If improper standards are applied and improper interests considered to deny a preliminary injunction as to a particularly important opportunity for speech, then that moment will *always* be lost. RTAO has verified its intent to do similar future activity, so the need for preliminary injunctions to be considered under proper standards is capable of

repetition yet evading review. FEC's argument that no preliminary injunction is now required is simply a mootness argument in new guise and must be rejected if proper standards are to be put in place for the next opportune speech moment. *Citizens* expressly rejected any regime whereby a citizen group "learns . . . whether it could have spoken . . . long after the opportunity to persuade . . . has passed." 130 S. Ct. at 895.

Conclusion

This Court should grant the petition and decide the issues both as to abuse of discretion and on the merits —as there is no need to remand this case, which turns on issues of constitutional law. The Court should also decide how preliminary injunction standards must be applied in First Amendment cases.

Respectfully submitted,

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